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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

RAYMOND J. SAMBS,
Petitioner,

vs.

CITY OF BROOKFIELD,
A Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does the statutory scheme of limitation of recovery in municipal tort cases in Wisconsin violate the rights of Sambs to the equal protection of the laws under the 14th Amendment of the Constitution of the United States?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 2

PARTIES 2

OPINIONS BELOW 2

JURISDICTION OF THIS COURT 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 7

I. The Sub-Classification Of The Victims Of Municipal Tort-Feasors Created By The Wisconsin Statutory Scheme Of Limitations Violate Equal Protection Guarantees 7

II. The Reasoning In The Decision Of The Wisconsin Supreme Court Does Not Support The Conclusion Reached 19

(a) Highway Defects 21

(b) Thousands of Miles of Highway 22

(c) Lack of Notice of Highway Defect 23

(d) Negligent Commission vs. Omission 24

(e) Insurance 24

(f) Protection of Municipal Treasury 27

Page

CONCLUSION 30

APPENDIX 1a-77a

CITATIONS

Cases:

Ayala et al. vs. Philadelphia Board of Public Education, 453 PA 584, 594, 595, 305 A.2d 877, 822 27

Cable vs. Marinette County, 17 Wis.2d 590, 163 N.W.2d 605 (1962) 23

Dunwiddie vs. Rock County, 28 Wis.2d 568, 573, 137 N.W.2d 388 (1965) 12

Holytz vs. Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962) 11-16

Marshall vs. City of Green Bay, 18 Wis.2d 496, 118 N.W.2d 715 (1963) 5

Omernils vs. State, 64 Wis.2d 6, 19, 218 N.W.2d 734 (1974) 29

Pauly vs. Keebler, 175 Wis. 428, 430, 431, 185 N.W. 554 (1921) 7

Sambs vs. Brookfield, 66 Wis.2d 296, 224 N.W.2d 582 (1975) 2,4

Page

Sambs vs. City of Brookfield,
No. 75-532 (S.Ct. February 23, 1976).....2,17,25

Sambs vs. Nowak,
47 Wis.2d 158, 177 N.W.2d 144 (1970) 2

Schwartz vs. Milwaukee,
43 Wis.2d 107, 123,
168 N.W.2d 107 (1969)..... 14

Stanhope vs. Brown County,
90 Wis.2d 823, 280 N.W.2d
711 (1979) 6,7

Turner vs. Staggs,
510 P.2d 879, Cert. Den.
414 U.S. 1079, 38 L.Ed.
2d 486, 945 Ct. 598 (1973)..... 30

CONSTITUTIONAL PROVISIONS

Section I Amendment XIV and VII,
United States Constitution 3,7,8

Article I Section I,
Wisconsin Constitution 7

Federal Statutes:

28 USC §1257 (C. 646, 62 Stat. 926)..... 3

28 USC §2101 (C. 646, 62 Stat.
961; C. 139 §106, 63 Stat. 104) 3

28 USC §2403 (b)..... 3

11 USC #901 Ch.9..... 29

Page

Wisconsin Statutes:

§81.15 (1965)..... 1,4-6,8,10,11,13,14,18,19,22-24

§895.43 (2) (1965) 1,4-6,12

§345.05 7,8,10,11,13,18,26

§270.58 (1943)..... 8,11,13,26,28

§895.45 11,18,26

§895.46 (1973).....10,11,26

§895.43 (4) 12-16

Other Text:

Handbook of Law Torts,
Dean W. Prosser (3rd Ed)
#125 24

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 78-599

RAYMOND J. SAMBS,
Petitioner,

vs.

CITY OF BROOKFIELD,
A Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Raymond J. Sambs prays that a Writ of Certiorari be issued to review a Judgment of the Supreme Court of the State of Wisconsin, holding that the Judgment awarding damages in the amount of $949,645.66 to Sambs, the Plaintiff-Petitioner, against the Defendant-Respondent, City of Brookfield for extensive personal injuries arising out of an automobile accident on February 21, 1965, must be reduced to $25,000.00 in conformity with §81.15 and §895.43 (2), Wis. Stats. (1965) and further holding that the Judgments of the Circuit Court and the Wisconsin Court of Appeals declaring said Statutes to be void and violative of the 14th Amendment of the United States Constitution for failure to afford Sambs the equal protection of the laws, be reversed.

QUESTIONS PRESENTED FOR REVIEW

Does the statutory scheme of limitation of recovery in municipal tort cases in Wisconsin violate the rights of Sambs to the equal protection of the laws under the 14th Amendment of the Constitution of the United States?

PARTIES

A list of all parties to the proceeding in the Trial Court were the following: Raymond J. Sambs, Plaintiff-Petitioner; City of Brookfield, Defendant-Respondent; Wayne J. Nowak, Defendant; and, Royal Globe Insurance Companies, Defendant. The only parties to this case in the Wisconsin Court of Appeals, the Supreme Court of the State of Wisconsin and in this Court are: Raymond J. Sambs, Petitioner-Plaintiff and City of Brookfield, Respondent-Defendant.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin sought to be reviewed is reported in Volume 97 Wis.2d at Page 356 et seq., 293 N.W.2d 504 et seq. Other opinions appearing in the official and unofficial reports relating to this case are as follows: *Sambs vs. Nowak,* 47 Wis.2d 158, 177 N.W.2d 144 (1970); *Sambs vs. Brookfield,* 66 Wis.2d 296, 224 N.W.2d 582 (1975); and, *Sambs vs. City of Brookfield,* No. 75-532 (S.Ct. February 23, 1976) (unpublished decision set forth in Appendix C).

JURISDICTION OF THIS COURT

The Judgment sought to be reviewed was entered on August 13, 1980, pursuant to a Decision dated June 27, 1980. The jurisdiction of this Court is invoked

under 28 USC §1257 (C. 646, 62 Stat. 929) and 28 USC §2101 (C. 646, 62 Stat. 961; C. 139 §106, 63 Stat. 104). Also, note that 28 USC §2403 (b) is applicable to this case.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portions of the Constitution of the United States involved in this case are the following clause of Section I, Amendment XIV:

> "*** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and Amendment VII which reads as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

The basic facts material to the question presented by this Petition are undisputed. They are set forth in the Wisconsin Supreme Court's opinion, which is appended to this Petition as Appendix A, and the opinion of the Wisconsin Court of Appeals which is appended to this Petition as Appendix B. Reference to record pages is accordingly determined unnecessary by the nature of the statement of the case.

This Petition seeks a review of the decision of the Wisconsin Supreme Court which in turn reviewed a decision of the Wisconsin Court of Appeals which in

turn affirmed a judgment of the Circuit Court for Waukesha County, Max Raskin, Circuit Judge.

The judgment awarded damages in the amount of $949,645.66 to Sambs, the Petitioner, who suffered extensive personal injuries arising out of an automobile accident on February 21, 1965, in the City of Brookfield. As a result of the accident, the Petitioner suffered paralysis from his mid-chest, extending over the lower half of his body. The acts and omissions on the part of the City in the maintenance and repair of the highway were a proximate cause of the accident and resulting injuries.

This case was bifurcated into two trials: one on negligence and one on damages. In the trial on negligence, the jury found the driver, Nowak, 70% causally negligent and the City 30% causally negligent. In motions after verdict, the City contended that recoverable damages in this case are limited to $25,000.00 by virtue of §81.15 and §895.43 (2), Wis. Stats. (1965). Sambs contended that the $25,000.00 statutory limitation on the recovery of damages from the municipality was waived by the City by virtue of its purchase of an accident liability policy in the amount of $500,000.00. The trial court approved the verdict of the jury and found that the respondent City had waived the statutory $25,000.00 limitation on the recovery of damages by acquiring the accident liability policy in the amount of $500,000.00. An interlocutory judgment was entered accordingly. An appeal from this judgment was taken to the Wisconsin Supreme Court by the City in 1975.[1] The Wisconsin Supreme Court affirmed the judgment as to negligence, but reversed the ruling that the purchase of a liability policy in the amount of $500,000.00 waived the $25,000,00 statutory limitation on recovery. In making

[1]*Sambs vs. Brookfield,* 66 Wis.2d 296, 224 N.W.2d 582 (1975).

this holding the Wisconsin Supreme Court determined that the benefits of the statute inure to the insurers, thus distinguishing this case from *Marshall vs. City of Green Bay,* 18 Wis.2d 496, 118 N.W.2d 715 (1963).

In the 1975 appeal, the Petitioner raised constitutional questions for the first time at the Supreme Court level, since the judgment of the trial court had been favorable to the Petitioner. The Wisconsin Supreme Court stated that since damages had not yet been determined, there was no compelling reason for the Court to reach the constitutional issues. Thus, this bifurcated case was returned to the trial court for the determination of damages.

After the return of the record to the trial court, the trial court upon the request of the City entered an amended interlocutory judgment limiting damages recoverable from the City to $25,000.00. The Petitioner appealed this interlocutory judgment. Upon appeal, the Wisconsin Supreme Court, in an unpublished opinion (Appendix D), modified the interlocutory judgment by eliminating the limitation of damages to $25,000.00 and reserving the question of the constitutionality of §81.15 and §895.43 (2), Wis. Stats. (1963), and affirmed the interlocutory judgment as so modified.

After a trial on the issue of damages, the jury returned its verdict on March 31, 1978, in which it awarded a total of $949,645.66 in damages. In its decision on motions after verdict the trial court denied each of the defendant's motions.

As one of the motions after verdict, the City of Brookfield asked the trial court to limit any judgment to $25,000.00 as provided by §81.15 and §895.43 (2), Wis. Stats. (1965). The Petitioner contended in the trial court that both statutues violate the equal protection and due process clauses of the 14th Amendment. After finding that the Petitioner had standing to challenge

the constitutionality of the statutes and after reviewing the basic constitutional principles that govern the Court's examination of the statutes, the trial court reached several conclusions. The trial court found that there are no substantial distinctions which differentiate the victims of public tort-feasers from those affected in the private sector. According to the trial court, the injuries are no less severe and a classification may not be based on the identity of the tort-feasors. Furthermore, the statute does not even apply equally to each public tort victim. It ignores the degree of injury to the victim in the amount of damages awarded. In the trial court's opinion, the statute discriminates between members of the same class when it allows a victim suffering damages below the maximum to be fully compensated but allows a victim who sustains damages to a sum beyond that limitation to only recover the allotted maximum. The trial court found the statutes unreasonable, arbitrary and failing in the rule of equality. The trial court therefore found the statutes violate the constitutional guarantee of equal protection. Additionally, the trial court stated that the statutes deprive a victim of governmental negligence of a trial by jury.

After the trial court's decision, but before the decision of the Wisconsin Court of Appeals in this case, the Supreme Court of Wisconsin determined in the case of *Stanhope vs. Brown County,* 90 Wis. 2d 823, 280 N.W.2d 711 (1979) that the classification of victims of municipal tort-feasors *vis-a-vis* victims of private tort-feasors was a reasonable classification and that therefore the validity of §81.15 Wis. Stats. must be upheld.

Nevertheless, in the case at bar, the Petitioner argued and the Wisconsin Court of Appeals upheld an argument as to the unconstitutionality of §81.15 and §895.43 (2), Wis. Stats. (1965), which was not con-

sidered by the Wisconsin Supreme Court in *Stanhope*. The Petitioner argued and the Court of Appeals determined that these statutes and statutes such as §345.05, Wis. Stats., create improper classifications within the classification of "victims of public tort-feasors."

REASONS FOR GRANTING WRIT

I. The Sub-Classification Of The Victims Of Municipal Tort-Feasors Created By The Wisconsin Statutory Scheme Of Limitations Violate Equal Protection Guarantees.

The Equal Protection Clause is included in the Fourteenth Amendment to the United States Constitution,

> "—nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

The Wisconsin Constitution, Art. I, Sec. 1, provides:

> "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

This declaration of rights provides, *inter alia*, protection against unequal treatment by the state guaranteed by the Equal Protection Clause of the United States Constitution. *Pauly vs. Keebler*, 175 Wis. 428, 430, 431, 185 N.W. 554 (1921).

On February 21, 1965, at the time the Petitioner, Raymond J. Sambs, was rendered a paraplegic as a result of the established negligence of the respondent, City of Brookfield, in failing to properly repair and maintain its highways, the following statutes were in existence and applicable to the class of victims referred to as "Victims of Municipal Tortfeasors":

1. §81.15 Wis. Stats. 1849 (Victims of Highway defects) — $25,000.00 recovery limitation.
2. §345.05 Wis. Stats. 1957 (Victims of Governmental Automobile Negligence) — no recovery limitation.
3. §270.58 Wis. Stats. 1943 (Victims of Negligence of State or Municipal Officer, Agent or Employee) — no recovery limitation, with the State or municipality required to pay a judgment for damages so assessed against such officer, agents or employees.
4. §895.43 Wis. Stats. 1963 (Victims of other Governmental Negligence) — $25,000.00 recovery limitation.
5. §66.091 Wis. Stats. 1863 (Victims of Mobs or Riots) — no recovery limitation.
6. §174.11 Wis. Stats. 1919 (Victims Suffering Damages From Dogs To Domestic Animals Including Poultry and Mink) — no recovery limitation.

The Fourteenth Amendment of the United States Constitution prohibits unreasonable classification of *persons.*

In Wisconsin, Victims of Municipal Tort-feasors as a class are sub-classified as a result of the operation of

the above cited statutes. Permissible damage recovery for a victim of a municipal tort-feasor is limited or unlimited depending solely upon the manner in which the person injured became such a victim and a member of the sub-classification. It is the statutorily created sub-classification of victims of Municpal Tort-feasors which must satisfy equal protection guarantees.

It is the arbitrary and irrational statutorily created sub-classifications of the classification "Victims of Municipal Tort-feasors" which makes the Wisconsin statutory scheme impermissible and repugnant to the equal protection guarantees.

Since the law is clear that statutory classifications must necessarily disclose their rational basis, an examination must be made of the legislature's statutory sub-classifications of the classification Victims of Municipal Tort-feasors, whereby a person tortiously injured by a governmental body is limited or unlimited in his recovery dependent entirely upon the sub-classification within which he finds himself. Such an examination is required in order to determine whether such legislative sub-classifications of Victims of Municipal Tort-feasors were the result of a comprehensive legislative scheme in the sense of being a reasoned legislative decision or merely acts of the legislature without ever having addressed itself to the statutory sub-classifications created by such acts.

In order to answer that question, the purpose and history of the statutes comprising the overall statutory scheme created by the Wisconsin legislature, resulting in the sub-classifications of Victims of Municipal Tort-feasors, must be examined.

The early common law, of course, using the primitive theory that "the King can do no wrong," provided the sovereign immunity in behalf of the State and all of its political subdivisions. Immunity was the

almost absolute rule for many years. In the progressive development of the rule of reason, our Supreme Court recognized the ever increasing functional areas of municipal activity. From that recognition sprang the doctrine of "proprietary" vs. "governmental" function and, of course, liability exposure attached to "proprietary" activities. A somewhat later development concerned the negligently created "nuisance," again with liability exposure attaching, even if the condition created was completely within the governmental activity sphere. The legislature, again recognizing the fundamental harshness of the rule of immunity enacted what is now Sec. 81.15, Wis. Stats. in 1849, shortly after Statehood, providing at least a partial right of recovery for certain forms of municipal negligence, i.e., street defects. In 1863 Sec. 66.091 Wis. Stats. was enacted providing that counties and cities would be liable for injury to persons or property by a mob or riot with no damage recovery limitation. Over one hundred years later, in 1957, our legislature enacted Sec. 345.05, Wis. Stats., providing for unlimited liability exposure for the State and all of its political subdivisions arising out of the ownership or use of a motor vehicle. We are certain that the prophets of doom at that time predicted some very dire effects on the municipalities of the State. There have been no such dire effects. In 1943, our legislature enacted Section 270.58, (now Sec. 895.46, Wis. Stats.), which provided that the state or political subdivision was required to pay damages assessed against a "public officer" who had acted negligently but in good faith exercise of his official capacity. Sec. 270.58 Wis. Stats. was in existence at the time the petitioner, Raymond J. Sambs was paraplegically injured on February 21, 1965, and this statute was not changed until 1973. There was at that time and at the time the petitioner was injured no limit on the amount of recovery. Although not applicable to the case of the

petitioner, Raymond J. Sambs, but more to illustrate the confusion that the legislature has created in the field of governmental torts, following the abrogation of governmental immunity in Wisconsin, as hereinafter discussed, the changes to sec. 270.58 (1965), including the 1973 enactment of Sec. 895.45, Wis. Stats. the amendment to Sec. 895.46 Wis. Stats. (1973), now creates the anomaly that the State's obligation to pay a judgment against a public officer is limited to $100,000.00, and a political subdivision's obligation is still without limitation under Sec. 895.46, Wis. Stats.

Another example of the legislature's dislike for the doctrine of governmental immunity was its enactment of Sec. 174.11, Wis. Stats., providing for actions against towns, villages or cities for damage by dogs to domestic animals, including poultry and mink.

Thus in 1962, before the Wisconsin Supreme Court made its decision to abrogate government immunity in the case of *Holytz v. Milwaukee,* 17 Wis.2d 26, 115 N.W.2d 618 (1962) different statutory rules applied to Victims of Governmental Tortfeasors with the amount of their recovery for injuries and damages resting exclusively on how they became such victims. The *Holytz* decision found this irregularity in the application of governmental immunity and corrected it by abolishing governmental immunity.

The Holytz decision in effect rendered Secs. 81.15, 66.091, 174.11, 270.58 and 345.05 Wis. Stats. unnecessary to the extent that they afforded specific and in some cases limited rights of recovery against a governmental body. Liability became the rule rather than the exception. The decision, changing judicially created law was made prospective to afford a reasonable opportunity for governmental bodies to secure appropriate insurance coverage, and for the legislature to act if it saw fit to act.

In the case of *Dunwiddie v. Rock County,* 28 Wis.2d 568, 573, 137 N.W.2d 388 (1965) the Court stated:

> "In *Holytz* we contemplated the abrogation of the doctrine of governmental immunity would affect the area covered in sec. 81.15, Stats., and, in fact, pointed out that that section in respect to its notice provisions and limitation of amount of damages would stand and be a limitation upon the right to recover. In *Lang v. Cumberland* 1962, 18 Wis. (2d) 157, 165, 118 N.W. (2d) 114, in explaining the effect of *Holytz* in relation to sec. 81.15, we stated, 'Before *Holytz,* liability of the municipality arose by virtue of sec. 81.15 upon the giving of notice. Since *Holytz,* the liability would exist in the absence of the statute, and the statute is a limitation upon it.' "

It is in this light that we must consider the response of the legislature to the *Holytz* decision by enacting in 1963 Sec. 331.43, now 895.43, Wis. Stats. Sec. 895.43, (2) (1963) provides:

> "(2) The amount recoverable by any person for any damage, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $25,000.00. No punitive damages shall be allowed or recoverable in any such action."

The legislature then proceeded to include the following language in subsection (4) of the statute:

> "... When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employee thereof for injury, damage or death, such statute shall apply and the limitations in subsection (2) shall be inapplicable."

The Wisconsin legislature, being faced with many divergent pre-*Holytz* tort statutes involving governmental bodies with variant limits of liability, instead of limiting the recovery of damages arising from governmental tort regardless of the manner in which such damages were incurred by the victim, enacted Section 895.43, Stats., providing in subsection 2 for a $25,000.00 limitation for "Victims of Governmental Tortfeasors," and, further providing in subsection (4) of such statute that such $25,000.00 limitation would be inapplicable to any other statute providing rights or remedies against any governmental body, its officers, agents and employees. With the inclusion of the provision of subsection 4 in Sec. 895.43, Wis. Stats., all of the pre-*Holytz* statutes (i.e. 81.15, 66.091, 345.05, 274.11 and 270.58 Wis. Stats.) were maintained in existence and were applicable to Victims of Governmental Tortfeasors when the petitioner, Raymond J. Sambs, suffered his paraplegic injuries through the negligence of the respondent, City of Brookfield. The legislature thus unconstitutionally split Victims of Governmental Tortfeasors arbitrarily into numerous artificial classes unnaturally, unreasonably and without any rational basis in law or in fact.

As was stated in 16 Am Jur 2d, *Constitutional Law* Section 754 on page 839:

> "... The legislature cannot take what might be termed 'a natural class of person,' split that

> class in two, and then arbitrarily designate the disservered fractions of the original unit as two classes and thereupon enact different rules for the government of each."

The legislature at the time of enacting Sec. 895.43, Wis. Stats. allowed Sec. 81.15, Wis. Stats., which had been in existence for over 100 years prior to the *Holytz* decision, to remain in existence. Section 81.15 was not specifically selected by the legislature to exist for any special or particular purpose, but was preserved with all other existing statutes providing for rights and remedies against governmental bodies by the sweeping language of 895.43 (4), Wis. Stats.

There is nothing in the history of Section 81.15, Wis. Stats. to even remotely suggest or cause one to reasonably believe that the legislature ever addressed itself to this statute, in the post *Holytz* era, any more than it did with respect to all the other statutes dealing with governmental liability, which were also in existence at the time of the *Holytz* decision and at the time of the enactment of Section 895.43, Stats.

With the legislature's enactment of Section 895.43, Wis. Stats. following the *Holytz* decision there was no reason for the existence of Section 81.15, Stats.

As was stated by Justice Hallows in the case of *Schwartz v. Milwaukee* 43 Wis.2d 107, 123, 168 N.W.2d 107 (1969):

> "A lot of confusion in the practice would be avoided if the legislature would repeal sec. 81.15, which is no longer needed since our decision in *Holytz v. Milwaukee* (1962), 17 Wis.2d 26, 115 N.W.2d 618, and the amendment to sec. 895.43."

After a thorough examination of the history of the overall statutory scheme involving "governmental

tortfeasors" and the manner in which the statutory classification of the "Victims of Governmental Tortfeasors" came into existence, following the *Holytz* decision, it is impossible to find a reasonable basis to justify the action of the legislature in perpetuating and re-imposing all of the pre-*Holytz* enabling statutes by its enactment of Sec. 895.43 (4) Wis. Stats.

It is clear that the legislature's enactment of 895.43 (4) resulting in the perpetuating and re-imposing of all pre-*Holytz* statutes and further resulting in constitutionally indefensible and illogical subclassifications of Victims of Governmental Tortfeasors, was not the result of a reasoned legislative decision to carry out a comprehensive statutory scheme. It is equally clear that such enactment was not the result of the legislature addressing itself to the impermissible statutory classification scheme created by its act.

The legislature like everyone else in Wisconsin was surprised when the *Holytz* Court, after over 100 years, suddenly abrogated government immunity. Shortly after the legislature reconvened it acted swiftly in imposing a $25,000.00 governmental tort recovery limitation with its enactment of Sec. 895.43 (2) Wis. Stats.

Not having made a comprehensive study of all existing statutes on the books covering the field of governmental torts, the legislature, as legislatures are prone to do in such circumstances, included a legislative safety exception in the form of subsection (4) by preserving all rights or remedies created by any other statutes. In some cases such a catch-all statutory exception is harmless and at times legislatively beneficial. The Wisconsin legislature's employment of such statutory exception provision, however, was disastrous and resulted in the violation of the equal protection guarantees of the constitution by making

the application of the statutory scheme thus created in the field of governmental torts arbitrary, irrational and constitutionally discriminatory as it affected the right of damage recovery by Victims of Governmental Tort-feasors.

The enactment of Sec. 895.43 by the Wisconsin legislature was nothing more than an abrupt reflex reaction to the *Holytz* decision, and with the inclusion in such statute of a provision making the $25,000.00 recovery limitation inapplicable where rights or remedies are provided by any other statute in existence at the time, the irrational and illogical sub-classification recognized and corrected by the *Holytz* decision was reimposed.

Since it is all too evident that the legislature had no objective or reasonable basis for its creation of the sub-classifications of Victims of Governmental Tort-feasors by the enactment of Sec. 895.43 (4) Wis. Stats., the next inquiry which must be made is whether there is a distinction between the sub-classifications of Victims of Governmental Tort-feasors created by the Wisconsin legislature, even though unwittingly so created, which rationally and in reality makes one class really different from the other.

The law is clear that when statutorily created classes lack distinctiveness, rationally such classifications will be in violation of the equal protection clause of the constitution.

It is feasible, although highly unlikely that classifications unwittingly created by a legislature without an objective or rational basis in mind, might be truly distinctive and of such a nature that a court improperly employing ingenuity would be able to rationalize or construct a reasonable basis on which the legislature could have based such classifications, if it had thought about it.

Such was not the case in Wisconsin. The sub-classifications of Victims of Governmental Tort-feasors having come into existence without a legislative objective or reasonable basis, resulted in illogical, irrational and unconstitutional classifications of such victims.

The practical effect of the statutory scheme of sub-classifications with respect to Victims of Governmental Tort-feasors is that similarly situated persons do not receive similar treatment.

The learned Chief Judge of the Wisconsin Court of Appeals, Clair Voss, recognized the realities of the situation in *Sambs vs. City of Brookfield,* 95 Wis.2d 1, 15, 16, 17, 289 N.W.2d 308, (1979) where he, speaking for the court, held unconstitutional the statutory limitations on recovery by the petitioner against the respondent, City of Brookfield. The Court could find no discernible relationship between reality and the recovery limitation statutes limiting damage awards to Victims of Governmental Tort-feasors in some cases but not in others stating as follows:

> '... the remedies available are determined solely upon the classification. The classifications are forced and artificial. The victims are not different, the tort-feasors are not different, the injuries are not different and the circumstances surrounding the injuries are not different. There is no logical reason why the State can afford to pay unlimited amounts of money if the injury results from an automobile accident with a municipal vehicle but can only afford to pay up to $25,000.00 if the injury results from an automobile accident caused by a defective highway.

The artificial distinctions are easily illustrated. For example, two people are traveling down the same highway. The first person is forced off the road due to a defect in the highway; this person is paralyzed as a result of this accident. The second person misses the defect but a few seconds later collides with a municipal vehicle being negligently operated in the course of municipal business; this second person is paralyzed as result of this accident. The first person may recover no more than $25,000.00, while the second person is unlimited in his recovery. There are no substantial distinctions which make one class really different from the other. This court believes the only difference is an artificial and arbitrary distinction created by the legislature ...."

"... It cannot be maintained that the state treasury needs protection by limiting liability to $25,000.00 in sec. 81.15, Stats., yet the state treasury can afford unlimited liability in sec. 345.05, Stats., or $100,000 liability in sec. 895.45, Stats. It is unreasonable for the legislature to take its chances in the area of automobile accidents, yet abruptly limit the liability for identical injuries caused by a highway defect. ...

"... As stated previously, the victims are the same, the tortfeasors are the same, and the injuries are the same. However, one is limited in recovery to $25,000; the characteristic of one is not so far different from the other to justify different limits in liability. The public good receives no benefit from such arbitrary and capricious classifications.

> In view of the reasons and analysis set forth in this opinion, secs. 81.15 and 895.43, Stats., are hereby declared unconstitutional in that they create arbitrary, capricious and unreasonable classifications in violation of the Equal Protection Clause of the United States Constitution."

II. The Reasoning In The Decision Of The Wisconsin Supreme Court Does Not Support The Conclusion Reached.

We respectfully request that the Wisconsin Supreme Court decision (Pet. A-1a) be critically compared with the Wisconsin Court of Appeals decision (Pet. A-26a) which was written by the learned and experienced Judge Clair Voss.

The Wisconsin Supreme Court decision, does, even if somewhat apologetically, adopt the proper standard of review, i.e., whether there is a *rational basis* to support the challenged statute. (Pet. A-9a).

However, the same decision includes various paraphrases of that standard;

> "The question is whether the differences in the circumstances under which governmental units become potential tort defendants are sufficient to sustain the legislature's enactment of different limits on the amount of recovery by the victims of governmental torts." (Pet. A-7a)

and,

> "The Court (in the *Stanhope* case) concluded that the legislature had a *reasonable* basis in setting the $25,000.00 limit in §81.15 to

> protect the public treasury." (Pet. A-9a) (Emphasis Supplied)
>
> and,
>
> "...it is the Court's obligation to locate or *to construct, if possible,* a rationale that *might have influenced* the legislature and that reasonably upholds the legislative determination." (Pet. A-17a) (Emphasis Supplied)
>
> and,
>
> "... we said the challenged classification must rationally relate to a legitimate state interest:..." (Pet. A-16a)

Therefore, the "rational basis" adopted by the Wisconsin Supreme Court is simply stated, the need to protect the public treasury — even at the expense of the victim, who, in this case has already suffered and will suffer a lifetime of severe limitation, deprivation and financial hardship.

Now, let us examine the decision to determine how the *need* (which is the "rational basis") is identified, described, delineated and founded. The decision attempts to justify the admittedly grossly disparate treatment of victims of municipal torts, despite the rather candid acknowledgement that:

> "The legislature has not set forth its rationale for imposing a monetary limitation on recovery in §§81.15, 895.43, and 895.45, Wis. Stats., or for its failure to impose a monetary limitation on recovery in §§66.091 and 345.05." (Pet. A-17a).

In that attempt, the Wisconsin Supreme Court went completely beyond the realm of reality in its effort to locate or to construct a "rational basis" for the statutorily created sub-classifications of Victims of

Municipal Tort-feasors, when no legislative expression for such sub-classifications existed.

The Wisconsin Supreme Court in a desperate effort to support the challenged legislation begins with the search for a "rationale that might have influenced the legislature..." (Pet. A-17a) and proceeded to suggest various interests and factors in a vain attempt to justify the legislative sub-classifications of Victims of Governmental Tort-feasors, to wit:

1. Need for special protection of the public treasury in highway defect cases as opposed to no such need with respect to the unlimited recovery of damages in governmental vehicle accident cases, and mob riot cases.

2. Ready availability of insurance to protect the public treasury in certain governmental risk areas.

3. Need to protect the government in the activities it performs and the need to prevent impairment of the ability of the government to govern efficiently.

The attempt of the Wisconsin Supreme Court to vindicate the unreasonable sub-classifications of Victims of Governmental Tort-feasors unwittingly created by the legislature and its attempt to credit the legislature with a "rational basis" for the creation of such sub-classifications, will not withstand a prudent and careful scrutiny.

Highway Defects

The Wisconsin Supreme Court's first argument that a highway defect is a special type of risk to the public treasury distinguishable from other types of

municipal tort risks, is a conglomeration of remote and highly suspect assumptions, which can best be broken down and described as:

1. Thousands of Miles of Highway vs. Greater Vehicle Control.
2. Lack of Notice of Highway Defect.
3. Negligent Commission vs. Omission.

Those assumptions are used to justify the constitutionality of §81.15 Wis. Stats., with its unequal treatment of the victims of highway defects as compared with the treatment of other "Victims of Municipal Tort-feasors." This is a torturing of the rational basis test and cannot support such an obviously unconstitutional statute.

Thousands of Miles of Highway vs. Greater Vehicle Control

The Supreme Court's reasoning that highway defects require special statutory limitations completely ignores the fact that the thousands of miles of highways are constantly utilized by thousands of governmental vehicles, with thousands of governmental employees, who have the opportunity to inspect the highways for defects, and further ignores the fact that the thousands of moving governmental vehicles using those thousands of miles of highways have a higher exposure to accidents with a concomitant higher exposure to devastatingly high damages by the municipalities owning such vehicles.

The greater vehicle control argument is facetious at best since once a municipal vehicle is placed in motion, with the human factor necessarily involved, there is far less municipal control over such vehicle

with respect to being involved in a municipal tort, than the control which every municipality has over its stationary highway.

Lack of Notice Of Highway Defect

The lack of notice of a highway defect by a governmental body assumed by the Wisconsin Supreme Court to constitute a rational basis for upholding the constitutionality of §81.15, Wis. Stats., would require a finding that §81.15, Wis. Stats. was in essence a strict liability statute. Such a strict liability argument has been long ago put to final rest by the Wisconsin Supreme Court in the case of *Cable vs. Marinette County,* 17 Wis.2d 590, 163 N.W.2d 605 (1962), where the Court stated on page 596, as follows:

> "The provisions of §81.15 Stats., relating to the right of recovery against a governmental unit for damages sustained because of an insufficiency, while suggesting absolute liability, an action brought pursuant to this statute is, in legal contemplation, an action for negligence and the comparative negligence statute applies. *Hales vs. Wauwatosa* (1957) 275 Wis. 445, 82 N.W.2d 301."

Thus, a municipality can be liable for a highway defect under §81.15, Wis. Stats., only if it is negligent. This is the same as in the case of a municipal vehicle involved in an accident. The potential for accidents in both cases is the same with the exception that highway defects, unlike automobile accidents, do not happen suddenly. With a highway defect there is time to discover and repair a defect. If the municipality has no notice of a highway defect or no time to repair the same after discovery, there would be no negligence on the part of the municipality and no requirement for it to respond in damages to a victim injured as a result of such highway defect.

Negligent Commission vs. Omission

As to this distinction of the Court, suffice it to say that negligence is negligence, be it active or passive. The tortured reasoning in support of the distinction does nothing but prove the desperation of the Court. It is absolutely certain that the risk of passive negligence is more, not less, controllable by the municipality involved.

The attempt of the Wisconsin Supreme Court to distinguish §81.15, Wis. Stats., from the other divergent governmental tort recovery statutes is blatantly artificial and without basis.

The protection of the public treasury argument of the Wisconsin Supreme Court to justify the legislature's unconstitutional sub-classifications of Victims of Municipal Tort-feasors is nothing more than a judicial apologetic for the actions of the legislature in classifying governmental tort victims in violation of the equal protection quarantees of the constitution. The Wisconsin Supreme Court threw in the protection of the public treasury argument simply because there was nothing better at hand. Fear of economic consequences and judicial deference to the legislature are mere excuses for the continued existence of limited immunity rather than justification for such a doctrine. *Dean W. Prosser, Handbook Of The Law Of Torts, (3rd Ed.) #125.*

The necessity of protecting the public treasury fails as a rational justification for the legislature's statutory discrimination between Victims of Municipal Tort-Feasors.

Insurance

The court's assumption of the ready availability of insurance to protect the public treasury, as a rational

basis justifying the legislature's discriminatory sub-classifications of Victims of Municipal Tortfeasors, proceeds on the basis that automobile liability insurance is readily available to all governmental units to insure their vehicles, and, by inference, is not available with respect to general liability insurance.

It is interesting to note in *Sambs vs. City of Brookfield,* 66 Wis.2d 296, 312 (1974), that the City of Brookfield, at the time Raymond J. Sambs was injured on February 21, 1965, had an automobile liability insurance policy with limits of $250,000 per person and $500,000.00 per accident, and also at that time had a general liability insurance policy, covering other torts, with limits of $500,000.00 per person and $1,000,000.00 per accident.

The City of Brookfield would have been really under-insured if Raymond J. Sambs had been negligently injured by one of the City of Brookfield's vehicles. Thus it is clear that the availability of insurance, even if we assume that fact, is of little significance in view of the deliberative process of selecting limits and the unpredictability of accidents.

Does the alleged or assumed ready availability of automobile liability insurance really constitute a rational basis for the arbitrary sub-classifications of "Victims of Governmental Tortfeasors?" What if a municipal vehcile is negligently involved in an accident with a school bus or causes a train derailment involving multiple, severe, disfiguring or paraplegic injuries, or worse the release of poisonous gas on the community from an exploding tank car attached to the train? How would the public treasuries of any community, large or small, rich or poor, be protected from the "overage" on their automobile liability policies?

And if the ready availability of automobile liability insurance is a valid argument, it is inconceivable that the legislature would allow Sec. 270.58 (the predecessor to Secs. 895.45 and 895.46, Stats.) to remain in existence. An officer, agent, or employee, who has negligently caused an injury to a person, within the scope of his employment and while acting in good faith, is subject to an unlimited judgment, by the victim of his negligent act, and under Sec. 270.58, Stats., unlimited liability is permitted against the municipality for indemnification of any such judgment obtained against the officer, agent or employee.

In the same vein it is inconceivable how the legislature can permit unlimited municipal liability for injuries from a mob or riot under Section 66.091, Wis. Stats. An automobile liability insurance policy, in such a case, would be no protection for the public treasury of the municipality.

If the legislature permits unlimited municipal liability under Section 345.05, Wis. Stats., it should require municipalities to carry unlimited automobile liability insurance; and we all know there is no such thing as unlimited automobile liability insurance.

If the legislature were really serious in allowing unlimited liability recovery under §345.05, Wis. Stats., because of the ready availability of automobile insurance, it has created a monstrous problem for municipalities. It has left the municipalities in an extremely precarious position, to a greater or lesser degree, depending on their financial ability to obtain adequate automobile liability insurance, or their competency to realize how much automobile liability insurance is adequate to protect their public treasuries.

Thus the assumption by the Wisconsin Supreme Court of the availability of insurance as a rational basis for the subclassifications of Victims of Municipal Tortfeasors, completely fails.

Protection Of Municipal Treasury

The veiled argument of the Wisconsin Supreme Court that the need to protect a municipality in the activities it performs and its ability to govern efficiently constituted a rational basis for the legislature's arbitrary sub-classification of Victims of Municipal Tortfeasors, is also without justification.

As was so aptly stated in the case of *Ayala et al v. Philadelphia Board of Public Education,* 453 Pa 584, 594, 595, 305 A.2d 877, 822:

> " '... (T)oday cities and states are active and virile creatures capable of inflicting great harm and their civil liability should be co-extensive. Even though a governmental body does not profit from its projects, the taxpaying public nevertheless does, and it is the taxpaying public which should pay for governmental maladministration. If the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim. See 2 Harper and James, Torts, 622 (1956).' "

The following statements of the Wisconsin Supreme Court in the case at bar puporting to form a rational basis for the legislature's discriminatory sub-classifications of Victims of Municipal Tort-feasors are astounding:

> "... Unlimited recovery to all victims may impair the ability of government to govern efficiently ..." (P. 23a)

> "We conclude that the legislature in enacting Secs. 81.15 and 895.43 could reason that a maximum should be imposed on the amount recoverable in those situations where the burden of unlimited liability may be substantial *and the danger of disrupting the functioning of local government* by requiring payment of substantial damage awards may be great ..." (emphasis supplied)

To propound such an argument as a justification for the discriminating treatment of Victims of Governmental Tort-feasors by the Wisconsin legislature is to unbelievably hold that of all institutions, only government cannot function efficiently if it is made responsible for its negligent acts.

More baffling, of course, is the Court's belief that the ability of the municipality to govern efficiently could be impaired by permitting the unlimited recovery of damages by all municipal tort victims regardless of the manner in which they were tortuously injured.

The function of government would not be impaired if a large judgment were obtained by a Victim of a Municipal Tort-feasor, regardless of whether such judgment were obtained as a result of a highway defect or a municipal vehicle accident or a mob or riot or as a result of the reimbursement by a municipality of a judgment obtained agianst one of its negligent officers, agents or employees under the provisions of Sec. 270.58, Wis. Stats., (1965) or even as a result of an overage in excess of the limits of an automobile or general liability insurance policy obtained by the governmental body.

Several alternatives are available to a municipality to assure itself that governmental functions will not be hampered:

First. A judgment creditor cannot execute on or foreclose a docketed judgment but may, at worst, cause it to be added to the next tax levy, Sec. 66.09, Wis. Stats.

Second. A municipality under the authority of Chapter 67 of the Wisconsin Statutes, relating to temporary borrowings, could borrow money for a short or a long term period to pay the judgment.

Third. If circumstances required it, which can occur even now as to a judgment for overage on its automobile liability insurance coverage, or for any other reason, the municipality can reorganize under Chapter 9 of the new Federal Bankruptcy Act by filing a Reorganization Plan and postponing the payment of any judgment or other debts over a period of years, without any disruption in normal municipal services.

Chapter 9 of the Bankruptcy Code effective October 1, 1979, commencing at 11 U.S.C. #901, is entitled "Adjustments of Debts of a Municipality."

We sincerely urge an analytical comparison of the Wisconsin Supreme Court's Decision with the decision of the Wisconsin Court of Appeals written by Judge Clair Voss. Judge Voss, writing for a three judge panel, acknowledges the same standard, i.e., a "rational basis" founded upon "a legitimate state interest," *Omernils vs. State,* supra, and concludes that the statutory scheme, with its variant effect upon similar circumstances and upon the treasuries of the units of government involved, cannot meet the test and must fail.

In a very logical, intellectual decision, proceeding from background to issue to conclusion, Judge Voss is

unable to find any rational basis for the statutory scheme. We also cannot find a rational basis. The fact is that there is none to be found.

CONCLUSION

Wisconsin's court of last resort has decided the federal questions involved in this case in a way which is conflict with the decision of another state court of last resort, namely, the State of Nevada, in *Turner vs. Staggs,* 510 P.2d 879 Cert. Den. 414 U.S. 1079, 38 L.Ed. 2d 486, 945 Ct. 598 (1973), which held that the classification of governmental tortfeasors is not a rational classification.

However, even if the Nevada rule were not adopted by the United States Supreme Court, the Wisconsin judgment appealed from should be reversed because of its sub-classification of Victims of Municipal Tortfeasors.

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

V. JOHN BURGGRAF
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Dated September 24, 1980

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APPENDIX A

Raymond J. SAMB,
Plaintiff-Respondent,

v.

CITY OF BROOKFIELD,
Defendant-Appellant-Petitioner.

Supreme Court

No. 78-599. Argued May 5, 1980.—
Decided June 27, 1980

(Originally reported in 95 Wis.2d 1, 289 N.W.2d 308.)

1. Constitutional Law §192*—equal protection—legislative purposes—statutory limitation, damages.

Statutory limitation on recoverable damages in amount of $25,000 did not per se violate guarantee of equal protection where plaintiff suffered extensive personal injuries arising out of automobile accident for which city was found 30% causally negligent in failing to properly maintain and repair highway (Stats §§881.15, 895.43(2)).

2. Constitutional Law §192*—equal protection—classification for legislative purposes—principles of review.

In reviewing constitutionality of classification, all legislative acts are presumed constitutional, heavy burden is placed on party challenging constitutionality, and where any doubt exists it must be resolved in favor of constitutionality of statute, and when statutory classification is challenged as

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*See Callaghan's Wisconsin Digest, same topic and section number.

violative of equal protection clause, challenger must prove abuse of legislative discretion beyond reasonable doubt.

3. Constitutional Law §192*—equal protection—classification—government tort-feasors.

Appropriate test for review of classification of governmental tort-feasors and their victims is whether there is rational basis for classification.

4. Constitutional Law §216*—equal protection—amounts recoverable, legislative limitation.

Plaintiff did not carry burden of proving that it was arbitrary or invidious for legislature to limit amount recoverable by victim of highway defect from city to $25,000 where legislature in enacting statutory provision could reason that maximum should be imposed on amount recoverable in those situations where burden of unlimited liability could be substantial and danger of disrupting functioning of local government by requiring payment of substantial damage awards could be great (Stats §§81.15, 895.43).

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

For the appellant-petitioner there were briefs by *Michael J. Gross* and *Hippenmeyer, Reilly, Arenz & Molter* of Waukesha; *George Schmus* of West Allis; *Borgelt, Powell, Peterson & Frauen, S.C.*, of counsel, of Milwaukee, and oral argument by *Joseph D. McDevitt* of Milwaukee.

For the respondent there were briefs by *V. John Burggraf* of Wauwatosa; *Wickert & Fuhrman* and

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*See Callaghan's Wisconsin Digest, same topic and section number.

Arron Belongia, of counsel, all of Milwaukee, and oral argument by *Mr. Burggraf.*

Brief amicus curiae on behalf of the League of Wisconsin Municipalities was filed by *Burt P. Natkins,* legal counsel, of Madison.

SHIRLEY S. ABRAHAMSON, J. This is a review of a decision of the court of appeals, *Sambs v. City of Brookfield,* 95 Wis.2d 1, 289 N.W.2d 308 (Ct. App. 1979), which affirmed a judgment of the circuit court for Waukesha county, Max Raskin, Circuit Judge.[1] The judgment awarded damages in the amount of $949,645.66 to Sambs, the plaintiff, who suffered extensive personal injuries arising out of an automobile accident on February 21, 1965, for which the city of Brookfield was found 30 percent causally negligent in failing to properly maintain and repair a highway.[2] The city of Brookfield asserted in the circuit court and in the court of appeals that the maximum amount the plaintiff may recover is $25,000, pursuant to sec. 81.15[3] and sec. 895.43(2),[4] Stats. 1965. The court of appeals affirmed

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[1]On May 9, 1980, the plaintiff moved for leave to file a response to the brief of the amicus curiae and attached his responsive brief to the motion papers. Because of the new issues discussed in the brief of the amicus curiae and the timeliness of the responsive brief, we grant the plaintiff's motion for leave to file a response to the brief of the amicus curiae and we have considered the brief.

[2]This case has been before this court three times previously: *See Sambs v. Nowak,* 47 Wis.2d 158, 177 N.W.2d 144 (1970); *Sambs v. Brookfield,* 66 Wis.2d 296, 224 N.W.2d 582 (1975); and *Sambs v. City of Brookfield,* No. 75-532 (S. Ct. February 23, 1976) (unpublished decision). The facts are set forth in the published opinions of this court and the published opinion of the court of appeals.

[3]Sec. 81.15, Stats. 1965, provides:

"81.15 **Damages caused by highway defects; liability of town and county.** If damages happen to any person or his property by reason of the insufficiency or want of repairs of any

the judgment, holding that the $25,000 limitation on the recovery of damages arising from highway defects in secs. 81.15 and 895.43(2), Stats 1965, violates the equal protection guarantees of the federal and state constitutions.[5] The court of appeals concluded that the legislature had created improper classifications within the class of "victims of public tort-feasors" by establishing limitations on the amount that a victim could recover depending on the nature of the tort-feasor's conduct causing the injury. We reverse the decision of the court of appeals. We conclude that secs. 81.15 and 895.43(2), Stats. 1965, do not violate the constitutional guarantees of equal protection, and we therefore hold that plaintiff's recovery against Brookfield is limited by statute to $25,000.

The plaintiff asserts that the Wisconsin legislature has afforded victims of governmental torts different

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highway which any town, city or village is bound to keep in repair, the person sustaining such damages shall have a right to recover the same from such town, city or village. If such damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county shall be liable therefor and the claim for damages shall be against the county. If the damages happen by reason of the insufficiency or want of repairs of a bridge erected or maintained at the expense of 2 or more towns the action shall be brought against all the towns liable for the repairs of the bridge and upon recovery of judgment the damages and costs shall be paid by such towns in the proportion in which they are liable for such repairs; and the court may direct the judgment to be collected from each town for its proportion only. No such action shall be maintained unless within 120 days after the happening of the event causing such damages, notice in writing signed by the party, his agent or attorney shall be given to the county clerk of the county, a supervisor of the town, one of the trustees of the village or mayor or city clerk of the city against which damages are claimed, stating the place where such damages occurred, and describing generally the insufficiency or want of repair which occasioned it and that satisfaction therefor is claimed

legal rights on the basis of the nature of the tort committed and that there is no rational basis for this differentiation. The plaintiff poses the following example: Two cars are traveling down the same highway. The first car is forced off the road due to a defect in the highway and the driver is paralyzed as a result of this accident. The second car misses the defect but a few seconds later collides with a municipal vehicle being operated negligently in the course of municipal business; the driver of the second car is paralyzed as a result of this accident. The driver of the first car may recover no more than $25,000, while the driver of the second car may recover his full claim for damages. The Wisconsin statutes limit the recovery of victims of highway defects to $25,000, sec. 81.15, Stats. 1965, while the statutes apparently do not limit the amount recovered by victims of motor vehicle accidents, sec. 345.05, Stats. 1965.[6]

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of such county, town, city or village. No notice given hereunder shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place or the insufficiency or want of repairs which caused the damages for which satisfaction is claimed, if it appears that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby. The amount recoverable by any person for any damages so sustained shall in no case exceed $25,000. No action shall be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless such accumulation existed for 3 weeks."

[6]Sec. 895.43, Stats. 1965, provides:

"895.43 **Tort actions against political corporations, governmental subdivisions or agencies and officers, agents or employes; notice of claim; limitation of damages and suits.** (1) No action founded on tort, except as provided in s. 345.05, shall be maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of such corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment

Although both the plaintiff and the court of appeals, 95 Wis.2d at 11, n. 14, compare sec. 81.15 and sec. 345.05 for illustrative purposes, their conclusion that the statutory limit in sec. 81.15 is unconstitutional is not based on this example only but on an examination of various statutory provisions classifying governmental torts.

The plaintiff points out that sec. 66.091, Stats.,[7] renders a county or city liable for injury to person or property by a mob or riot and the section does not expressly limit the dollar amount that can be recovered. On the other hand, sec. 895.43(2), Stats. 1965, generally limits the amount recoverable by a person for injuries or death in a tort suit against a municipal governmental unit or municipal public officer to $25,000, unless otherwise provided by statute. The amount recoverable against a state officer for a

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unless within 120 days after the happening of the event causing the injury or damage or death complained of, written notice of the time, place and circumstances of the injury or damage signed by the party, his agent or attorney is served on such volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 262.06. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the damage or injury and the injured party shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe.

"(2) The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $25,000. No punitive damages shall be allowed or recoverable in any such action.

tort is presently limited to $100,000. Sec. 895.45(4), Stats.[8]

The plaintiff demonstrates that because of the fortuity of the nature of the governmental tort-feasor and the conduct, *i.e.*, whether the victim's claim falls within sec. 66.091, sec. 81.15, sec. 895.43(2), or sec. 895.45, victims whose injuries are the same will be entitled to different amounts of recovery. It is because of this statutory pattern of differentiating the amount the victim can recover on the basis of the type of tortious activity by the particular governmental unit involved or its officers or employees that the plaintiff argues that secs. 81.15 and 895.43, Stats., which purport to limit recovery in the instant case, violate the constitutional guarantees of equal protection.

The question is whether the differences in the circumstances under which governmental units become potential tort defendants are sufficient to sustain the

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"(3) No suit shall be brought against any political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor shall any suit be brought against such fire company, corporation, subdivision or agency or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

"(4) Except as hereinafter provided, the provisions and limitations of this section shall be exclusive and shall apply to all actions in tort against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employe thereof for acts done in an official capacity or the course of his agency or employment. Nothing in this section shall bar an action or impose limitations in any action against any such officer, official, agent or employe individually for intentional torts. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (2) shall be inapplicable."

legislature's enactment of different limits on the amount of recovery by the victims of governmental torts.

The city of Brookfield maintains that the question plaintiff presents in the instant case was decided by this court in *Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979). We think *Stanhope* is relevant but not controlling.

In *Stanhope* the plaintiff argued that the statutes established two classes of plaintiffs (victims of governmental negligence and victims of non-governmental negligence) and two classes of defendants (governmental tort-feasors and non-governmental tort-feasors). Stanhope argued that limiting the liability of governmental tort-feasors and limiting the recovery of the victims of governmental tort-feasors to $25,000 as provided by secs. 81.15 and 895.43 was unconstitutional under the equal protection

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[5]The Equal Protection Clause is included in the Fourteenth Amendment to the United States Constitution:

"... nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

The Wisconsin Constitution, Art. I, Sec. 1, provides:

"All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

This declaration of rights provides, *inter alia*, protection against unequal treatment by the state guaranteed by the equal protection clause of the United States Constitution. *Pauly v. Keebler*, 175 Wis. 428, 430, 431, 185 N.W. 554 (1921).

[6]Sec. 345.05, Stats. 1965, provides:

"345.05 **State and municipal liability for motor vehicle accidents.** (1) In this section the following terms have the designated meanings:

"(a) "Municipality" means any county, city, village, town, school district (as enumerated in s. 67.01(1)), sewer district, drainage district, community center and, without restriction

guarantees of the state and federal constitutions and Art. I, sec. 9, of the Wisconsin Constitution, the "certain remedy" clause.[9]

Analyzing the statutes under the rational basis test, this court found the statutes constitutional. The court concluded that the legislature had a reasonable basis in setting the $25,000 limit in sec. 81.15 to protect the public treasury. The court pointed out that the legislative classification Stanhope challenged expressed a legislative balancing of two purposes: "To compensate victims of government tort-feasors while at the same time protecting the public treasury." 90 Wis.2d at 842. This court was unwilling to say that the legislature had no rational basis to fear that full monetary responsibility entailed the risk of insolvency of municipal governmental entities or intolerable tax burdens. The court said it was within the legitimate power of the legislature to take steps to preserve

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because of failure of enumeration, any other political subdivision of the state.

"(b) "Governing body" means the state legislature with reference to the state, the county board with reference to counties, the town board with reference to towns, the legislative body of a city or village with reference to cities and villages and the board of any district, center or other municipality with reference to other municipalities enumerated in par. (a).

"(c) "Business" means any business whether governmental or proprietary.

"(2) Any of the following may file a claim for damages against the state or municipality concerned and the governing body thereof may allow, compromise, settle and pay the same:

"(a) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by the state or a municipality, which damage was occasioned by the operation of such motor vehicle in the course of its business. For the purposes of this subsection, a motor vehicle shall be deemed owned and operated by the state or a municipality if such vehicle is either being rented or leased, or is being purchased under a contract whereby the state or municipality will acquire title.

sufficient public funds to insure that the government would be able to continue to provide those services which it believes benefit the citizenry. The court concluded that "the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tort-feasors to recover their losses up to that limit." 90 Wis.2d at 842. *See also,* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922, 958 (1978).

As to the specific monetary limitation on recovery the court said that the monetary limit is one which the legislature determines after balancing the ideal of equal justice and the need for fiscal security. Stanhope argued that the $25,000 figure was unreasonably low and that many states had not imposed any limit on recovery and had not experienced any fiscal dif-

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"(b) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned or operated by the state through the agency of the Wisconsin national guard, the Wisconsin air national guard or the members or employes thereof when on state duty and whether paid from state or federal funds and which damage was occasioned by the operation of such motor vehicle in the performance of its business.

"(3) The manner and form of and the place for filing claims shall be:

"(a) If against the state, as provided in s. 16.53(8), with the department of administration.

"(b) If against any county, as provided in ss. 59.76 and 59.77 (1), with the county clerk.

"(c) If against any city, as provided in s. 62.25, with the city clerk.

"(d) If against any village, as provided in s. 61.51, with the village clerk.

"(e) If against any town, as provided in s. 60.36, with the town clerk.

"(f) If against any school district, as provided in s. 40.31.

"(g) If against any other municipality, the claim shall be filed with the person who performs the duties of a clerk or secretary and

ficulties. The court said it could not conclude on the basis of the record in *Stanhope* that the $25,000 ceiling adopted by the legislature was arbitrary or unreasonable or violated state and federal constitutional guarantees. This court recognized that whatever the monetary limitation on recovery, the amount will seem arbitrary because it is based on imponderables, and that the legislature, not the court, must select the figure. The limit enacted by the legislature "'must be accepted unless we can say that it is very wide of any reasonable mark.' *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 41 (1928)." *Stanhope,* 90 Wis.2d at 843, n. 11.

[1]

We must acknowledge that the $25,000 statutory limitation appears low when considering this case which graphically illustrates the severity of physical

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shall state the time and place of the accident and an itemized statement of the damages sought.

"(4) Failure of the governing body to pass upon the claim within 90 days after presentation constitutes a disallowance. Disallowance by the governing body bars any action founded on the claim unless brought within 6 months after disallowance. Actions against the state and payment of the amount recovered shall be as provided in ss. 285.01 and 285.04. For the purposes of this section, judgments against municipalities shall be certified, filed and collected as provided in s. 66.09 whether named therein or not.

"(5) If the allowance of claim is by or the judgment is against any municipality lying in more than one town, city, village or county, the governing body of the debtor municipality shall prorate the amount of the claim allowed or the judgment and so certify to the proper officials for tax levy, so that the taxable property of the debtor municipality will equitably bear the amount of the claim or judgment.

"(6) This section does not create any liability against a county for any act of the sheriff where such liability is prohibited by Article VI, section 4, Wisconsin constitution."

The court of appeals, 95 Wis.2d at 8, 12, assumed that sec. 345.05, Stats. 1965, provides for unlimited recovery for persons

injury which may be sustained by tort victims, the high costs of medical care, and the large amount of monetary damages awarded. The New Hampshire Supreme Court recently concluded "that a $50,000 statutory limitation on tort recoveries is precariously close to the boundary of acceptability" and urged the legislature, as we do, "to review periodically all statutory limitations of recovery, including the one at issue here, to insure that inflation and political considerations do not lead to inequitable disparities in treatment." *Estate of Cargill v. City of Rochester,* — N.H. —, 406 A.2d 704, 708, 709 (1979). Nevertheless, on the basis of the record of this case, we conclude, for the reasons set forth in *Stanhope,* that a statutory limitation on recoverable damages in the amount of $25,000 does not per se violate the guarantees of equal protection.

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damaged by the negligent operation of a motor vehicle owned and operated by a municipality, reasoning that sec. 345.05, Stats. 1965, was a statute to which the statement in sec. 895.43(4), Stats. 1965, applies:

"When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (2) [which includes the $25,000 limit] shall be inapplicable."

[7]Sec. 66.091, Stats., provides:

"66.091 **Mob damage.** (1) The county shall be liable for injury to person or property by a mob or riot therein, except that within cities the city shall be liable.

"(2) Claim therefor must be filed within 6 months thereafter. Such claim may be allowed in whole or in part, as other claims, and procedure to enforce shall be as for other claims.

"(3) The city or county may recover all such claims and costs paid by it, against any and all persons engaged in inflicting the injury.

"(4) No person shall recover hereunder when the injury was occasioned or in any manner aided, sanctioned, or permitted by him or caused by his negligence, nor unless he shall have used all reasonable diligence to prevent the same, and shall have im-

The plaintiff in the instant case, however, raises an equal protection issue that was not raised or considered in the *Stanhope* case. Here the plaintiff contends that the legislature has created improper classifications within the classification of "victims of public tort-feasors." In *Stanhope,* this court compared the class of victims of public tort-feasors to the class of victims of governmental tort-feasors and held that sec. 81.15 is constitutional; this court did not decide whether statutory distinctions among the sub-classifications of victims of governmental tort-feasors were constitutional. In *Stanhope* we stated that if sovereign immunity is waived, "legislative enactments must conform to the equal protection and due process guarantees of the state and federal constitutions." 90 Wis.2d at 844. *See also, Brown v. Wichita State University,* 219 Kan. 2, 547 P.2d 1015, 1021, appeal dismissed, 429 U.S. 806 (1976); *Estate of Cargill v. City of Rochester,* — N.H. —, 406 A.2d 704 (1979); *Harvey v.*

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mediately notified the mayor or sheriff after being apprised of any threat of or attempt at such injury. Every mayor or sheriff receiving such notice shall take all legal means to prevent injury, and if he refuse or neglect to do so, the party injured may elect to hold such officer liable by bringing action against him within 6 months of the injury.

"(5) This section shall not apply to property damage to houses of ill fame when the owner has notice that they are used as such."

[8]Sec. 895.45, Stats. 1977, provides:

"895.45 **Timeliness, definition of claimant, notice and limited liability.** (1) No civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of such officer's, employe's or agent's duties, unless within 90 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved.

Clyde Park Dt., 32 Ill.2d 60, 203 N.E.2d 573, 577 (1965). The court of appeals, paying heed to this caution, held unconstitutional the statutory limitations on the amount of damages recoverable against the city of Brookfield, finding no discernible relationship between reality and the statutes limiting damage awards in certain instances and not in others, saying:

> "... The classifications are forced and artificial. The victims are not different, the tortfeasors are not different, the injuries are not different and the circumstances surrounding the injuries are not different. There is no logical reason why the State can afford to pay unlimited amounts of money if the injury results from an automobile accident with a municipal vehicle but can only afford to pay up to $25,000 if the injury results from an automobile accident caused by a defective highway.

"(2) In this section, "claimant" means the person or entity sustaining the damage or injury or his agent, attorney or personal representative.

"(3) The notice under sub. (1) shall be sworn to by the claimant and shall be served upon the attorney general at his office in the capitol by certified mail. Notice shall be considered to be given upon mailing for the purpose of computing the time of giving notice.

"(4) The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employe or agent shall not exceed $100,000. No punitive damages may be allowed or recoverable in any such action."

[9]Art. I, sec. 9 of the Wisconsin Constitution provides:

"Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

"...

"It cannot be maintained that the state treasury needs protection by limiting liability to $25,000 in sec. 81.15, Stats., yet the state treasury can afford unlimited liability in sec. 345.05, Stats., or $100,000 liability in sec. 895.45, Stats. It is unreasonable for the legislature to take its chances in the area of automobile accidents, yet abruptly limit the liability for identical injuries caused by a highway defect. This court believes such action to be highly unreasonable.

"...

"As stated previously, the victims are the same, the tortfeasors are the same, and the injuries are the same. However, one is limited in recovery to $25,000; the characteristic of one is not so far different from the other to justify different limits in liability. The public good receives no benefit from such arbitrary and capricious classifications.

"...

"[S]ecs. 81.15 and 895.43, Stats., are hereby declared unconstitutional classifications in violation of the Equal Protection Clause of the United States Constitution." *Sambs v. City of Brookfield,* 95 Wis.2d 1, 15, 16, 17, 289 N.W.2d 308 (Ct. App. 1979).

[2]

In reviewing the constitutionality of the classification in issue, we begin with the principle repeatedly stated by this court and the United States Supreme Court that all legislative acts are presumed constitutional, that a heavy burden is placed on the party challenging constitutionality, and that if any doubt

exists it must be resolved in favor of the constitutionality of a statute. When a statutory classification is challenged as violative of the equal protection clause, the challenger must prove abuse of legislative discretion beyond a reasonable doubt. *Stanhope v. Brown County,* 90 Wis.2d 823, 837, 280 N.W.2d 711 (1979); *State v. Hart,* 89 Wis.2d 58, 64, 277 N.W.2d 843 (1979); *WKBH Television Inc. v. Dept. of Revenue,* 75 Wis.2d 557, 566, 250 N.W.2d 290 (1977); *State ex rel. La Follette v. Reuter,* 36 Wis.2d 96, 111, 153 N.W.2d 49 (1967).

[3]

The appropriate test for review of the classification of governmental tortfeasors and their victims is whether there is a rational basis for the classification. *Stanhope v. Brown County, supra; Binder v. Madison,* 72 Wis.2d 613, 622, 241 N.W.2d 613 (1976); *Estate of Cargill v. City of Rochester,* — N.H. —, 406 A.2d 704, 707 (1979). The United States Supreme Court described the "rational basis" test in *McGowan V. Maryland,* 366 U.S. 420, 425, 426 (1961) as follows:

> "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In *Omernik v. State,* 64 Wis.2d 6, 19, 218 N.W.2d 734 (1974), we said that the challenged classification must rationally relate to a legitimate state interest:

> "A legislative classification is presumed to be valid. The burden of proof is upon the challenging party to establish the invalidity of a statutory classification. Any reasonable basis for the classification will validate the statute. Equal protection of the law is denied only where the legislature has made irrational or arbitrary classification ..." The basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification.
>
> "Judicial response to a challenged legislative classification requires only that the reviewing court locate some reasonable basis for the classification made. The public policy involved is for the legislature, not the courts, to determine. ..."

The legislature has not set forth its rationale for imposing a monetary limitation on recovery in secs. 81.15, 895.43, and 895.45, Stats., or for its failure to impose a monetary limitation on recovery in secs. 66.091 and 345.05, Stats. However, it is the court's obligation to locate or to construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination. The rationale which the court locates or constructs is not likely to be indisputable. But it is not our task to determine the wisdom of the rationale or the legislation. The legislature assays the data available and decides the course to follow.

The city of Brookfield asserts that these statutes limiting the amount recoverable serve a legitimate public purpose to prevent the disastrous depletion of municipal treasuries, thereby safeguarding public funds and the government's ability to discharge public responsibility.

Historically governmental immunity was thought necessary to protect governmental funds from depletion by payment of damage claims, and it was reasoned that the individual victim's need to be made whole must give way to the public welfare. *See Ayala v. Phil. Bd. of Pub. Ed.*, 453 Pa. 584, 305 A.2d 877 (1973). We recognized in *Holytz v. Milwaukee*, 17 Wis.2d 26, 33, 115 N.W.2d 618 (1962), that the rule of government tort immunity was widely regarded as mistaken and unjust and that dislike of the doctrine could be seen in numerous legislative enactments authorizing governmental liability. In *Holytz* we abrogated the doctrine of immunity saying "so far as governmental responsibility for torts is concerned, the rule is liability — the exception is immunity." Nevertheless we recognized in *Holytz* that limitations on public tort responsibility continue to exist. *See* Davis, *Administrative Law*, sec. 25.11 (1958). We also recognized that judicial abrogation of common law immunity did not bind the legislature. "If the legislature deems it better public policy, it is, of course, free to reinstate immunity. The legislature may also impose ceilings on the amount of damages or set up administrative requirements which may be preliminary to the commencement of judicial proceedings for an alleged tort." *Holytz v. Milwaukee, supra*, 17 Wis.2d at 40.

Sec. 81.15, Stats., relating to governmental liability for highway defects, sec. 345.05, Stats., relating to governmental liability for the operation of motor vehicles, and sec. 66.091, Stats., relating to government liability for mob and riot damage, are examples of legislative exceptions to governmental immunity which predate *Holytz*. The legislature has changed the limitations on the amount recoverable under sec. 81.15 over the years. *Stanhope v. Brown County*, 90 Wis.2d at 839, n. 9. The recovery from government for damage

from motor vehicles[10] and from mob or riot[11] has apparently been unlimited for many years.

The legislature's goal after *Holytz* was to delineate the liability to which governmental units would be exposed as a result of *Holytz,* to reduce the financial strain, and to enable the governmental units to plan for the risk of such liability.

In 1963 the legislature in response to *Holytz* enacted sec. 331.43, Stats. 1963 (now sec. 895.43, Stats.), generally allowing actions founded on tort against political corporations, governmental subdivisions or agencies and officers, agents, or employees and limiting recovery to $25,000. In 1973, the legislature limited the amount recoverable in a suit against a state officer to $100,000. Laws of 1973, ch. 333, sec. 182c, sec. 895.45, Stats.

The city of Brookfield argues that there are good reasons for the legislature on the one hand to limit the amount recoverable with respect to highway defects (sec. 81.15 Stats.) and on the other hand to impose no limit on the amount recoverable where motor vehicles (sec. 345.05, Stats.) are involved. A municipality may have hundreds or thousands of miles of streets or highways within its jurisdiction; any number of phenomena beyond the municipality's control may cause a highway defect, such as abnormal weather conditions, shifts in the underlying soil conditions, acts of third parties; many highways defects can occur without actual notice to a municipality; more often than not the highway defect may result from the municipality's failure to act rather than its overt

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[10]Laws of 1929, ch. 77.

[11]Sec. 66.091, Stats., was first enacted by ch. 211, Laws of 1863 and has been amended a number of times. *See* Wisconsin Legislative Council Staff Research Bulletin 76-6, "Public Liability for Civil Disturbance Damage." 3-4 (1976).

conduct. Insurance may or may not be readily available at reasonable cost to municipalities to cover these risks. In contrast, the municipality can select the persons it authorizes to operate motor vehicles; it can regulate the use of motor vehicles in the course of its activities; and liability is usually associated with an overt act, "active" negligence, rather than a failure to act. The use of motor vehicles is an ordinary activity in the private, as well as the public, sectors and there is substantial experience in both sectors with tort liability in the use of motor vehicles. Automobile liability insurance apparently is readily available to governmental units.

These factors could influence a reasonable legislature to conclude that the municipal treasury could be protected from damage claims arising from the use of municipal motor vehicles without limiting the amount of the victim's recovery, but that the municipal treasury needs to be protected against excessive depletion of funds by limiting the amount of the victim's recovery in highway defect cases.

There also appears to be a basis for distinguishing sec. 81.15, which limits recovery for damages from highway defects, from sec. 66.091, which does not limit the amount of recovery for injuries occasioned by mob or riots. Sec. 66.091, unlike sec. 81.15, is of limited application. The words mob and riot are limited by statutory definition. A victim is not allowed to recover if "the injury was occasioned or in any manner aided, sanctioned, or permitted by him or caused by his negligence, nor unless he shall have immediately notified the mayor or sheriff after being apprised of any threat of or attempt at such injury." Also, if the injured party recovers from his insurer, the insurer cannot recover against the city or county under the theory of subrogation. *See Frebock v. Jefferson Co.* 219 Wis. 154, 262 N.W. 588 (1935); *Koss v. State,* 217 Wis.

325, 258 N.W. 860 (1935); *Interstate Fire and Casualty Co. v. Milwaukee,* 45 Wis.2d 331, 173 N.W.2d 187 (1970); America Ins. Co. v. Milwaukee, 51 Wis.2d 346, 187 N.W.2d 142 (1971).

Municipalities have not been subjected to substantial liability under sec. 66.091, Stats. A study by the Wisconsin Legislative Council Staff found that municipalities usually are "self-insured" for mob or riot damage "meeting the costs of mob or riot damage liability out of general funds" and that they have paid a small amount for damages under sec. 66.091:

> "In the 1969-1972 period, the City of Madison paid a total of $535 in settlements and judgments stemming from actions under this statute. In the same period Oshkosh and La Crosse paid no claims. The City of Milwaukee paid approximately $10,000 in the more than 300 cases brought against it under the statute during those years.
>
> "It is of interest to note that during the period of 1969-1972 a number of claims were filed against Madison totaling in the millions of dollars. Of all those claims the City of Madison paid a total of only $535. According to the city attorney's office, none of these claims was pursued in court." *See* Wisconsin Legislative Council Staff, *Public Liability for Civil Disturbance Damage* (Research Bull. 76-6, July 20, 1976).

The legislature could reasonably conclude on the basis of these factors that it need not put a ceiling on the amount to be recovered under sec. 66.091 in order to safeguard municipal treasuries. In comparison, the legislature could have believed that if it allowed unlimited recovery for damage incurred because of highway defects, there would be great risk to the

public treasury. The application of sec. 81.15 is not limited, and there is an exposure for substantial damages under sec. 81.15. There is therefore a rational basis for the different way of regulating recovery of damages under sec. 66.091 and sec. 81.15, Stats. 1965.

It appears that the legislature has imposed a ceiling on the victim's recovery if the liability statute is of broad, general application, exposes the government to many claims, and exposes the government to the risk of great financial loss against which the government may not be able to insure itself at reasonable cost. Consistent with this rationale, sec. 895.43, Stats., the general statutory provision allowing recovery against a municipal governmental unit or municipal public officer for injuries or for death "founded on tort", limited the amount recoverable to $25,000. *See* sec. 895.43, Stats., quoted at note 4, *supra*. The legislature also limits to $100,000 the amount recoverable in a civil action or civil proceeding against state officers for or on account of any act growing out of or committed in the course of the discharge of the officer's duties. Laws of 1973, ch. 333, sec. 182c; sec. 895.45(4), Stats.[12] The legislature could reasonably allow a higher amount to be recovered from the state than from a municipal unit of government, because the legislature could conclude that the state is in a better financial position to shoulder the burden of being

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[12]Sec. 895.46, Stats., requires the municipality or state to pay the judgment entered against its respective officer or employee. The predecessor of sec. 895.46, Stats., was sec. 270.58, Stats. 1965. *Forseth v. Sweet*, 38 Wis.2d 676, 158 N.W.2d 370 (1968). If the amount recoverable against the employee cannot exceed $25,000 under sec. 895.43(3), Stats., or $100,000 under sec. 895.45(4), Stats., the city of Brookfield assumes, although this issue has not been raised or decided, that under sec. 895.46 the damages recoverable from a municipality cannot exceed $25,000 and from the state, $100,000.

liable for a larger amount than is a municipal governmental unit.

Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a large number of people. Municipal units of government have hundreds and thousands of employees. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards; they operate numerous traffic signals, parking lots, office buildings, institutions, parks, beaches and swimming pools used by thousands of citizens. Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government unit may range from a few dollars to a few million dollars. A municipal unit of government, limited in fund-raising capacity, may lack the resources to withstand substantial unanticipated liability. Unlimited recovery to all victims may impair the ability of government to govern efficiently. *See* Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity,* 36 S. Cal L. Rev. 161 (1963).

It is the legislature's function to evaluate the risks, the extent of exposure to liability, the need to compensate citizens for injury, the availability of and cost of insurance, and the financial condition of the governmental units. It is the legislature's function to structure statutory provisions, which will protect the public interest in reimbursing the victim and in maintaining government services and which will be fair and reasonable to the victim and at the same time will be realistic regarding the financial burden to be placed on the taxpayers. Giving due deference to the legislature, this court will not set aside a statutory classification "if any state of facts reasonably may be

conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

[4]

We conclude that the legislature in enacting secs. 81.15 and 895.43 could reason that a maximum should be imposed on the amount recoverable in those situations where the burden of unlimited liability may be substantial and the danger of disrupting the functioning of local government by requiring payment of substantial damage awards may be great.[13] Accordingly, we conclude that the plaintiff has not carried his burden of proving that it is arbitrary or invidious for the legislature to limit the amounts recoverable by a victim of a highway defect from a city.

By the Court.—The decision of the court of appeals is reversed; the judgment of the circuit court is reversed; and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

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[13]For a court upholding a statutory scheme that imposes different ceilings of recovery for different torts and different units of government, although the scheme "resembles a crazy quilt more than a carefully balanced sculpture," *see Estate of Cargill v. Rochester,* — N.H. —, 406 A.2d 704, 708 (1979), in which the court said:

"It is argued that the limitation on recovery here is arbitrary and irrational when considered together with the different amounts available in actions against other government agencies. See RSA 110-A:81 (National Guard, $250); RSA 229:8-a (Supp. 1977) (state public works and highways, $300); RSA 541-B:12-14 (Supp 1977) (State, $10,000, $20,000 or $50,000 depending on type of claim and legislative goodwill); RSA 491:8 (State, contracts, no limit). *Accord, Harvey v. Clyde Park District,* 32 Ill.2d 60, 203 N.E.2d 573 (1965). It may still be true that the rules governing actions against governmental units are "'as logical as those governing French irregular verbs.'" *Gossler v. city of Manchester,* 107 N.H. 310, 315, 221 A.2d 242, 245 (1966) (Kenison, C.J., dissenting). In enacting a particular statute, however, the legislature "may address itself to only that phase of a problem that appears most acute," *Opinion of the Justices,* 117 N.H. 749, 758, 379 A.2d 782, 788 (1977), even if the

net result resembles a crazy quilt more than a carefully balanced sculpture. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S. Ct. 461, 99 L.Ed. 563 (1955). The equal protection clause does not require mathematical equivalence. *Richardson v. Brunelle*, 119 N.H. —, —, 398 A.2d 838, 840-41 (1979); see *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)."

APPENDIX B

SAMBS
Plaintiff-Respondent,
v.
CITY OF BROOKFIELD,
Defendant-Appellant.†

Court of Appeals

No. 78-599. Argued July 26, 1979. — Decided September 11, 1970.

1. Constitutional Law §192*—equal protection—statue's classification—reasonableness, standards.

Standards for determining reasonableness of statute's classification are that all classifications must be based upon substantial distinctions which make one class really different from another, classification adopted must be germane to purpose of law, classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to numbers included within class, law must apply equally to each member of class involved, and characteristics of each class should be so far different from those of other classes as to reasonably suggest at least propriety, having regard to public good, of substantially different legislation.

2. Constitutional Law §216*—equal protection—tort damages—separate classifications—rational basis.

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† Petition to review granted.

*See Callaghan's Wisconsin Digest, same topic and section number.

In personal injury action against city where plaintiff had contended that statutes limiting liability of towns, cities or villages to $25,000 for damages to any person or his property by reason of insufficiency or want of repairs of any highway violated equal protection and due process clause of Fourteenth Amendment, standard of equal protection review requires only that there be rational basis for separate classification of parties injured by public tort-feasors.

3. **Costitutional Law §264*—equal protection—legislative classifications—presumption of validity—burden of proof.**

Legislative classification is presumed to be valid, and burden of proof is upon challenging party to establish invalidity of statutory classification, thus challenger asserting that statutory classification is violative of equal protection clause must prove abuse of legislative discretion beyond reasonable doubt.

4. **Constitutional Law §264*—equal protection—statutory discrimination.**

Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

5. **Appeal and Error, §241*—matters raised first time on appeal—constitutional issues.**

Constitutional issues raised for first time on appeal can be entertained if there are compelling reasons to do so.

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*See Callaghan's Wisconsin Digest, same topic and section number.

6. Constitutional Law §203*—equal protection—classifications—statute—liability of municipality.

In personal injury action against municipality, statutes limiting liability of municipality if injury results from automobile accident caused by defective highway but allowing unlimited recovery if injury results from automobile accident with municipal vehicle were declared unconstitutional in that they created arbitrary, capricious and unreasonable classifications in violation of equal protection clause of United States Constitution (US Const, amend XIV).

7. Damages §119*—collateral source rule—other compensation.

Under collateral source rule, damages to injured person are not affected by fact that claimant received compensation from other sources such as sick leave, compensation, or insurance.

8. Damages §119* — collateral source rule — unpaid expenses.

In personal injury action against municipality, collateral source rule permitted recovery by plaintiff of past hospital and medical expenses, even though they had not been paid by anyone, where record demonstrated that medical expenses incurred had been reasonable and necessary.

9. Municipal Corporations §995* — claims presented specific dollar amount.

For claim to have efficacy under statute providing that no action shall be maintained against city

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*See Callaghan's Wisconsin Digest, same topic and section number.

upon claim of any kind until claimant shall first present his claim to council and it is disallowed in whole or in part, it must state specific dollar amount.

APPEAL from a judgment of the circuit court for Waukesha county: MAX RASKIN, Judge. *Affirmed.*

For the appellant, there were briefs submitted by *Hippenmeyer, Reilly, Arenz & Molter* and *George Schmus,* Of Counsel, with oral argument by *Richard S. Hippenmeyer* of Waukesha.

For the respondent, there was a brief by *V. John Burggraf, Wickert & Fuhrman* and *Aaron Belongia* of Milwaukee, with oral argument by *V. John Burggraf.*

Before Voss, P.J., Brown, J., and Bode, J.

VOSS, P.J. This is an appeal from the trial court decision rendered on May 9, 1978 in which the trial court held, among other things, that secs. 81.15 and 895.43 (2), Stats., were unconstitutional.[1]

On February 21, 1965, the plaintiff was injured in an automobile accident occurring in the City of Brookfield (City). As a result of the accident, the plaintiff suffered paralysis from his midchest, extending over the lower half of his body. According to the complaint, the acts and omissions on the part of the City in the maintenance and repair of the highway were a proximate cause of the accident and resulting injuries.

The case reached the Wisconsin Supreme Court in 1970 and raised the question of whether the City of

[1]It should be understood, for the purposes of this opinion, that the references to statutes affecting this decision concern the statutes in effect at the time the action was initially brought, unless otherwise indicated.

Brookfield had waived the $25,000 statutory limit contained in secs. 81.15 and 895.43 (2), Stats., by acquiring an accident liability policy with a $500,000 limit.[2] The court held that the City did not elect to waive the statutory limits of $25,000 and that the benefits of that statute enure to the insurer, thus distinguishing the case from *Marshall v. City of Green Bay,* 18 Wis.2d 496, 118 N.W.2d 715 (1963).

In 1975, the case was again before the Wisconsin Supreme Court.[3] The jury's verdict had found the driver, Nowak, 70% causally negligent and the City 30% causally negligent. The trial court approved the verdict and found that the defendant City had waived statutory limitations by acquiring the liability accident policy. The Wisconsin Supreme Court found this to be error and reversed the decision.

In the 1975 case, plaintiff raised constitutional questions for the first time at the supreme court level. The court stated since damages had not yet been determined, there was no compelling reason for the court to reach this issue. Thus, the case was returned to the trial court on the issue of damages.[4]

After a trial on the issue of damages, the jury returned its verdict on March 31, 1978 in which it awarded a total of $949,645.66 in damages.[5] In its decision on motions after verdict the trial court denied each of defendant's motions.

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[2]*Sambs v. Nowak,* 47 Wis.2d 158, 177 N.W.2d 144 (1970).

[3]*Sambs v. City of Brookfield,* 66 Wis.2d 296, 224 N.W.2d 582 (1975).

[4]This case was also the subject of an unpublished decision and order, *Sambs v. City of Brookfield,* No. 75-532 (Wis. S. Ct., February 23, 1976).

[5]Actual breakdown was as follows:

(1) pain, suffering and disability from the time of the accident to date of trial, $100,000; (2) pain, suffering and disability from day

As one of the motions after verdict, the City of Brookfield asked the trial court to limit any judgment to $25,000, as provided by secs. 81.15 and 895.43 (2), Stats.[6] Plaintiff contended that both statutes violate the equal protection and due process clause of the fourteenth amendment. After finding the plaintiff had standing to challenge the constitutionality of the statutes and after reviewing the basic constitutional principles which govern the court's examination of the statutes, the trial court reached several conclusions. The trial court found there are no substantial distinctions which differentiate the victims of public tortfeasors from those affected in the private sector. According to the trial court, the injuries are no less severe, and a classification may not be based on the identity of the tortfeasor. Furthermore, the statute does not even apply equally to each public tort victim. It

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of trial and for the remainder of his life, $150,000; (3) loss of earnings from the time of accident to date of trial, $70,000; (4) loss of earning capacity from date of trial and for the remainder of his life, $264,000; (5) drugs and equipment expenses incurred from time of accident to date of trial, $14,676; (6) drugs and equipment expenses from the date of trial and for the remainder of his life, $60,000; (7) hospital and medical expenses from the time of accident to date of trial, $9,169.66; (8) hospital and medical expenses from date of trial and for the remainder of his life, $40,000; (9) housekeeping services from date of accident to time of trial, $33,800; (10) housekeeping services from date of trial for the remainder of his life, $208,000.

[6]Section 81.15, Stats., reads in part as follows:

If damages happen to any person or his property by reason of the insufficiency or want of repairs of any highway ... the person sustaining such damages shall have a right to recover the same from such town, city or village. ... The amount recoverable by any person for any damages so sustained shall in no case exceed $25,000.

Section 895.43 (2), Stats., provides in part as follows:

The amount recoverable by any person for any damages, injuries, or death, in any action founded on tort against any ... governmental subdivision ... shall not exceed $25,000.

ignores the degree of injury to the victim and the amount of damages awarded. In the trial court's opinion, the statute discriminates between members of the same class when it allows a victim suffering damages below the maximum to be fully compensated but allows a victim who sustains damages to a sum beyond that limitation to only recover the allotted maximum. The court continued to find the statutes unreasonable, arbitrary and failing in the rule of equality. Therefore, the statutes violate the constitutional guarantee of equal protection. Additionally, the trial court stated that the statutes deprive a victim of governmental negligence of a trial by jury.

On appeal, the following issues are presented: (1) whether the judgment against the City of Brookfield should be limited to $25,000, pursuant to secs. 81.15 and 895.43 (2), Stats., (2) whether plaintiff is entitled to recover the hospital and medical expenses awarded by the jury in the seventh verdict answer, and (3) whether plaintiff's claim against the City entitles him to recover damages for wage loss, past and future medical expenses, and housekeeping expenses or whether plantiff is restricted to damages for personal injuries.

CONSTITUTIONALITY OF SECS. 81.15 AND 895.43 (2), STATS.

[1-4]

In order to properly examine the constitutionality of these statutes, it is necessary to briefly review the constitutional principles which guide this court's examination. The Wisconsin Supreme Court listed the standards for determining the reasonableness of a statute's classification in *Harris v. Kelley*, 70 Wis.2d 242, 252, 234 N.W. 2d 628, 632 (1975).

> (1) All classifications must be based upon substantial distinctions which made one class really different from another.
>
> (2) The classification adopted must be germane to the purpose of the law.
>
> (3) The classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within a class.
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) The characteristics of each class could be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. [Citations omitted.]

The standard of "equal protection" review requires only that there be a rational basis for separate classification of parties injured by public tortfeasors. *Binder v. City of Madison,* 72 Wis.2d 613, 622, 241 N.W.2d 613, 618 (1976). A legislative classification is presumed to be valid, and the burden of proof is upon the challenging party to establish the invalidity of a statutory classification. *Omernick v. State,* 64 Wis.2d 6, 18, 218 N.W.2d 734, 741-42 (1974). The challenger asserting that a statutory classification is violative of the equal protection clause must prove abuse of legislative discretion beyond a reasonable doubt. *State v. Hart,* 89 Wis.2d 58, 64, 277 N.W.2d 843, 846 (1979). Additionally, "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

In reference to legislative classifications, the following statement is made in 16 Am. Jur.2d *Constitutional Law,* §500 (1964):

> While the legislature has the power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, in such instances the class of persons on whom the law is to operate must possess some common disability, attribute or qualification, or must satisfy some condition marking them as proper objects for the operation of special or class legislation. [Footnote omitted.]

The State must proceed upon a rational basis; the burden of proof is on the challenger.

Considering these basic constitutional principles and guidelines, this court now addresses the constitutionality of secs. 81.15 and 895.43 (2), Stats., and their relation to the doctrine of sovereign immunity. In *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 37, 115 N.W.2d 618, 623 (1962), the Wisconsin court stated that the governmental immunity doctrine has judicial origins and that after careful consideration, the court felt it was appropriate to abolish this immunity, notwithstanding the legislature's failure to adopt corrective enactments. Furthermore, the court commented that "[i]f the legislature deems it better public policy, it is, of course, free to reinstate immunity. The legislature may also impose ceilings on the amount of damages or set up administrative requirements which may be preliminary to the commencement of judicial proceedings for an alleged tort." *Holytz v. City of Milwaukee, supra,* at 40, 115 N.W.2d at 625.

The legislature has reinstated immunity to varying degrees.[7] In the Wisconsin statutes applicable to the present action, there are, among others, the following degrees of immunity: (1) victims of street defects — liability limited to $25,000 by sec. 81.15, Stats., (2) victims of motor vehicle accidents — unlimited liability by sec. 345.05, Stats., (3) victims of torts by political corporations, governmental agencies or subdivisions and officers, agents or employees — liability limited to $25,000 by sec. 895.43 (2), Stats., and (4) victims of actions committed by a state officer in the course of his duties — limited liability of $100,000 by sec. 895.45, Stats. Defendant claims that all statutes dealing with immunity are within the legislature's prerogative in view of the court's decision in *Holytz v. City of Milwaukee.*[8] In relation to this argument, the Wisconsin Supreme Court has examined similar issues in *Stanhope v. Brown County,* 90 Wis.2d 823, 280 N.W.2d 711 (1979).

Stanhope appealed from the portion of a judgment which limited the damages she could recover from Brown County and Continental Casualty Insurance Company to $25,000. As in the present case, Brown County and Continental raised the defense, under secs. 81.15 and 895.43, Stats. (1971), that Stanhope could not recover more than $25,000 from Brown County. Stanhope argued that the Wisconsin legislature has established two classes of plaintiffs (victims of governmental negligence and victims of non-governmental negligence) and two classes of defendants (governmental tortfeasors and nongovernmental

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[7]Sections 81.15 and 345.05, Stats., existed at the time of *Holytz;* sec. 331.43, Stats., (now sec. 895.43, Stats.) was enacted in 1963.

[8]It should be noted that *Holytz* was not a constitutional case. It concerned the judicial abrogation of sovereign immunity and did not involve the constitutional questions which this court now examines.

tortfeasors). She contended that these classifications are unconstitutional under the equal protection guarantees of the state[9] and federal[10] constitutions and under Wis. Const., Art I, §9, the "certain remedy" clause.

After reviewing the relevant constitutional principles, the Wisconsin court discussed the historical background of governmental tort immunity.

> Although some view the rule as an extension of the theory that "the king can do no wrong," many believe it was born of expediency. Immunity was thought necessary to protect governmental funds from depletion in payment of damage claims. Another reason advanced for the doctrine was that the wrong to the individual must be submerged in the convenience of the public; the individual advantage must give way to the public welfare. [Citation omitted.] *Stanhope v. Brown County*, 90 Wis.2d at 838-39, 280 N.W.2d at 717.

The abrogation of common law municipal tort immunity in *Holytz* altered the function of sec. 81.15, Stats., and similar statutory provisions which were in existence when Holytz was decided.[11] "Before *Holytz*,

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[9]Wisconsin Constitution, Art. I, §1:

All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

[10]United States Constitution, Amend. XIV, §1, provides in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[11]*Stanhope v. Brown County*, 90 Wis.2d 823, 839-40, 280 N.W.2d 711, 718 (1979).

liability of the municipality arose by virtue of sec. 81.15 upon the giving of notice. Since *Holytz,* liability of the municipality would exist in the absence of the statute, and that statute is a limitation upon it."[12]

The court in *Stanhope* recognized the arguments for immunity and for liability.[13] According to the court, the legislative classification that Stanhope challenged expresses a legislative balancing of two purposes: to compensate victims of government tortfeasors and to protect the public treasury.

> We are unwilling to say that the legislature has no rational basis to fear that full monetary responsibility entails the risk of insolvency or intolerable tax burdens. Funds must be available in the public treasury to pay for essential governmental services; taxes must be kept at reasonable levels; it is for the legislature to choose how limited public funds will be spent. It is within the legitimate power of the legislature to take steps to preserve sufficient public funds will be spent. It is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes benefits the citizenry. We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fisal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit. *Stanhope v. Brown County,* 90 Wis.2d at 842, 280 N.W.2d at 719.

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[12]*Lang v. Cumberland,* 18 Wis.2d 157, 165, 118 N.W.2d 114, 118 (1962).

[13]Note 11, *supra,* at 839-41, 280 N.W.2d at 717-19.

In view of the court's reasoning directed to classification of victims of public tortfeasors versus victims of private tortfeasors, this court must deny any challenge by the plaintiff which is to the legislature's power to classify victims of public tortfeasors differently than victims of private tortfeasors.

[5]

However, the plaintiff raises an argument as to the constitutionality of secs. 81.15 and 895.43, Stats., which was not considered by the court in *Stanhope*. Plaintiff contends these statutes and statutes such as sec. 345.05, Stats., create improper classifications within the classification "victims of public tortfeasors."[14] The Wisconsin Supreme Court's reasoning in *Stanhope* was directed to the differentiation between victims of public tortfeasors and victims of private tortfeasors. As such, it was a narrow reasoning, isolated to a determination of the legislature's power to set limits of liability on the recovery of a victim of a public tortfeasor. The Wisconsin Supreme Court did not consider whether the legislature has created improper classifications within the class "victims of public tortfeasors," in establishing the various limits of liability. Therefore, it is the opinion of this court that the plaintiff is not precluded from raising this challenge and that the *Stanhope* decision does not control the present situation. Although it might be argued that this specific constitutional argument was not raised at the trial level, constitutional issues raised for the first time on appeal can be entertained if there are compelling reasons to

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[14]For illustrative purposes, sec. 345.05, Stats., will be compared with sec. 81.15, Stats., throughout this opinion. However, this court's conclusions are not based only upon this one example but upon a thorough examination of the various legislative classifications, such as those created by secs. 895.45 and 895.46, Stats.

do so.[15] Additionally, the trial court made note of this argument in its decision.[16] The interests in clarifying the state of the law and in preventing a gross injustice are reasons which compel this court to consider the challenge. This is particularly true since related constitutional issues were raised at the trial level.

In *Stanhope,* the Wisconsin Supreme Court stated it did not mean to imply that "because the state may choose either to maintain or waive its sovereign immunity, it is free to impose whatever conditions it pleases with respect to actions against the state or any of its political subdivisions."[17] The actions of the legislature in imposing these conditions are subject to the constitutional principles of reasonableness and nonarbitrariness. Plaintiff contends the legislature has violated these constitutional principles and has created unreasonable and arbitrary subclassifications within the classification "victims of public tortfeasors." For example, victims of street defects which result in an automobile accident are limited in their recovery to $25,000, while victims of automobile accidents involving the negligent operation of a vehicle owned and operated by the state or a municipality are unlimited in their recovery.

In examining the law in other jurisdictions, it becomes clear there is a scarcity of material on this specific issue. In *Harvey v. Clyde Park District,* 32 Ill.2d 60, 203 N.E. 2d 573 (1965), the court held that legislative classifications granting complete immunity to some, partial immunity to others, and no immunity to others violated the Illinois Constitution. Although the Illinois provision differs from the Wisconsin

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[15]Note 3, *supra,* at 314, 224 N.W.2d at 592.

[16]Record at BB 20 n. 7.

[17]Note 11, *supra,* at 843-44, 280 N.W.2d at 719-20.

Constitution, the court's reasoning is apposite to the present case. In *Treece v. Shawnee Community Unit School District, No. 84,* 39 Ill.2d 136, 233 N.E.2d 549 (1968), the court dealt with a challenge to the constitutionality of a statute which limited recovery against a public school district to $10,000. Although not specifically ruling on the validity of the statute, the court stated that its attitude toward arbitrarily formulated statutes has been made clear by the expressions in *Harvey v. Clyde Park District.*

Further assistance is provided by *Brown v. Wichita State University,* 217 Kan. 279, 540 P.2d 66 (1975). The court summarized the situation as follows:

> Presently the state and all of its agencies have absolute immunity "from liability and suit on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute." (K.S.A. 46-901.) A county, an auxiliary agency of the state, is immune from liability unless such liability is expressly imposed by statute, or necessarily implied therefrom. ... A city is liable for tortious conduct when engaged in proprietary activities, but enjoys immunity while engaged in governmental activities except for the creation and maintenance of a nuisance and the failure to keep streets reasonably safe. [Citations omitted.]
>
> Under the foregoing, persons injured by a governmental entity are classified, solely, by the type of governmental entity involved. Their right to redress and the remedies available, if any, to them is dependent solely upon this classification. *Brown v. Wichita State University,* 217 Kan. at 296, 540 P.2d at 81.

Furthermore, the court stated that a person's "right to redress by due course of law does not become less worthy of protection because he or she was injured by a particular governmental unit."[18] The court concluded that under the present law in Kansas, no regard was given to the injury or the facts or circumstances surrounding the events which caused the injury; the classification is forced and "greater burdens are imposed on some than others of the same desert."[19]

Although pertaining to a different factual situation, the reasoning in *Brown* is applicable to the present case. No regard is given to the injury or the facts surrounding the events which caused the injury in the classifications created by the legislature. The injuries caused by a negligently created street defect are no less severe than the injuries caused by the negligent operation of a municipal vehicle or by the actions of a state officer or employee.

Examining the standards stated by the Wisconsin Supreme Court in *Harris v. Kelley,* the reasonableness of the different classifications fail. According to these standards, all classifications must be based upon substantial distinctions which make on class really different from another. Comparing the classes established by secs. 81.15 and 345.05,[20] Stats., it become

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[18] *Brown v. Wichita State University,* 217 Kan. at 297, 540 P.2d at 81 (1975).

[19] *Id.*

[20] Section 345.05 (2) (a), Stats., reads as follows:

(2) Any of the following may file a claim for damages against the state or municipality concerned and the governing body thereof may allow, compromise, settle and pay the same:

(a) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by the state or a municipality, which damage was occasioned by the operation of such motor vehicle in the course of its business.

evident there are no substantial distinctions which make one class really different from another. Both statutes deal with victims of municipal torts, and both statutes deal with injuries which may be slight or may be paraplegic injuries. Yet the remedies available are determined solely upon the classification. The classifications are forced and artificial. The victims are not different, the tortfeasors are not different, the injuries are not different and the circumstances surrounding the injuries are not different. There is no logical reason why the State can afford to pay unlimited amounts of money if the injury results from an automobile accident with a municipal vehicle but can only afford to pay up to $25,000 if the injury results from an automobile accident caused by a defective highway.

The artificial distinctions are easily illustrated. For example, two people are traveling down the same highway. The first person is forced off the road due to a defect in the highway; this person is paralyzed as a result of this accident. The second person misses the defect but a few seconds later collides with a municipal vehicle being negligently operated in the course of municipal business; this second person is paralyzed as a result of this accident. The first person may recover no more than $25,000, while the second person is unlimited in his recovery. There are no substantial distinctions which make one class really different from the other. This court believes the only difference is an artificial and arbitrary distinction created by the legislature.

The second standard is that the classification must be germane to the purpose of the law. The purpose for limiting liability has been stated as protection of the public treasury and protection against devastatingly high judgments. Defendant may argue these reasons are applicable to plaintiff's challenge, particularly in

view of the *Stanhope* decision and the reversal of *Brown v. Wichita State University*. In the reversal of *Brown*,[21] the court stated that it is only necessary to reasonably conceive a state of facts to support governmental immunity in order to uphold a legislative classification. The court listed three reasons to support governmental immunity: (1) a necessity to protect the state treasury, (2) a need to allow the government to function unhampered by the threat of time and energy consuming legal actions, and (3) a necessity to protect the government because of the numerous administrative and high-risk activities undertaken by the various governments.[22] It should also be noted that *Brown* concerned a summary judgment motion and the right to complete immunity. Similarly, the Wisconsin Supreme Court in *Stanhope* concluded the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.

The reasons given by these two decisions clearly falter in the face of the present challenge. The *Stanhope* analysis is sufficient as long as one statute is considered in isolation. However, the *Stanhope* analysis is not applicable to this situation. It cannot be maintained that the state treasury needs protection by limiting liability to $25,000 in sec. 81.15, Stats., yet the state treasury can afford unlimited liability in sec. 345.05, Stats., or $100,000 liability in sec. 895.45, Stats. It is unreasonable for the legislature to take its chances in the area of automobile accidents, yet abruptly limit the liability for identical injuries caused

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[21] *Brown v. Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976).

[22] *Id.* at 16-17, 547 P.2d at 1027-28.

by a highway defect. This court believes such action to be highly unreasonable. The other reasons listed by the court in *Brown* are equally meritless. The second reason in *Brown* is inapplicable as the State engages in legal action even if the liability is limited. Additionally, the argument for protection because of high-risk activities is inconsistent with other statutes which have different limits of liability. On the basis of all these reasons, the court is of the opinion that the classifications are not germane to the "purpose" of the law. This court realizes it is to look for any state of facts which may be conceived to justify the classification; however, after a thorough and extensive examination, this court finds *no* state of facts to justify such classification.

For the purposes of this appeal, the third and fourth standards for classifications require no discussion. The fifth standard, however, provides that the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety, having regard to the public good, of substantially different legislation. What characteristics separate the classes created by secs. 81.15 and 345.05, Stats.? As stated previously, the victims are the same, the tortfeasors are the same, and the injuries are the same. However, one is limited in recovery to $25,000; the characteristic of one is not so far different from the other to justify different limits in liability. The public good receives no benefit from such arbitrary and capricious classifications.

[6]

In view of the reasons and analysis set forth in this opinion, secs. 81.15 and 895.43, Stats., are hereby declared unconstitutional in that they create arbitrary, capricious and unreasonable classifications in violation of the Equal Protection Clause of the United States Constitution. To many, this opinion may appear

to be a radical departure from long accepted practices. However, it is the duty and the responsibility of the judiciary in this case to determine the constitutionality of these statutes and of the classifications created by the legislature. This court has determined there is no reasonable basis to justify the classifications. Moreover, public policy dictates that such statutes be declared unconstitutional for it is in the greatest interests of justice that the legal process not allow complete recovery to some members of a class while denying it to others within the same class. The fact that similar statutes can be found in other jurisdictions is not determinative of this court's decision. While it is true that similar statutes in other states is an indication that the classification is reasonable,[23] this fact does not preclude a finding that the statutes are unconstitutional. In this case, the generally accepted practice has been wrong, and the judicial and legislatuve branches in Wisconsin have an opportunity to correct the matter and prevent further injustice.

This court repeats the instructions found in *Holytz* in that the legislature may impose ceilings on the amount of damages; however, these instructions may not be considered in isolation from *Stanhope*. The legislature is not free to impose whatever conditions it pleases with respect to actions against the state or any of its political subdivisions; "once sovereign immunity has been waived, legislative enactments must conform to the equal protection and due process guarantees of the state and federal constitutions."[24] Therefore, the legislature still possesses the power to impose ceilings. However, these ceilings shall not create improper classifications in violation of the state and federal constitutions.

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[23] *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1930).

[24] Note 11, *supra*, at 844, 280 N.W.2d at 720.

HOSPITAL AND MEDICAL EXPENSES

Defendant argues that past hospital and medical expenses which have not been paid by anyone should not be recoverable by the plaintiff because the medical creditors are now barred from recovering such expenses by the statute of limitations.

[7, 8]

Under the collateral source rule, damages to an injured person are "not affected by the fact that the claimant received compensation from other sources such as sick leave, compensation, or insurance." *Payne v. Bilco Co.*, 54 Wis.2d 424, 433, 195 N.W.2d 641, 647 (1972). Moreover, the Wisconsin court has noted that when medical services are rendered gratuitously to one who is injured, the injured party is, in many cases, entitled to recover the value of those services from the tortfeasor on the rationale that the tortfeasor should not get the advantage of gratuities from third parties. *Thoreson v. Milwaukee & S. Transport Corp.*, 56 Wis.2d 231, 243, 201 N.W.2d 745, 752 (1972). It is clear that the collateral source rule permits recovery by plaintiff of these past hospital and medical expenses. The record demonstrates the medical expenses incurred were reasonable and necessary, and the defendant should not be permitted to profit from lack of payment or lack of suit by the medical creditors.

SUFFICIENCY OF CLAIMS

According to defendant, plaintiff recovered for items not included in the claim filed against the City of Brookfield; therefore, these items of damages are barred by secs. 62.12 (8)[25] and 62.25,[26] Stats.

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[25]Section 62.12 (8), Stats., reads as follows:

(8) Claims. (a) All claims and demands against the city shall be itemized and filed with the clerk, who shall deliver the same to the comptroller for examination. The comptroller shall within 30

[9]

The trial court correctly interpreted sec. 62.12, Stats., as being applicable to fixed or contractual claims rather than to the damage claims involved in this case. Such a reading is necessary so the demand that all claims be itemized is reasonable and not oppressive. Section 62.25, Stats., is applicable to the case at bar. In *Sambs v. Nowak,* 47 Wis.2d 158, 165, 177 N.W.2d 144, 147 (1970), the court stated that it is well established "for a claim to have efficacy under sec. 62.25, Stats., it must state a specific dollar amount." In the notice of claim filed by the plaintiff, the nature of the injuries sustained were described in great detail; the claim stated more than a specific dollar amount.[27] The claim provided a sufficient base for settlement or compromise without resorting to costly litigation. Defendant's contention is unfounded.

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days thereafter examine such claim or demand and return the same to the clerk with his report thereon in writing, who shall place the same before the council for action at its next meeting.

[26]Section 62.25, Stats., reads in part as follows:

(1) Claims. (a) No action shall be maintained against a city upon a claim of any kind until the claimant shall first present his claim to the council and it is disallowed in whole or in part. Failure of the council to pass upon the claim within 90 days after presentation is a disallowance.

[27]The claim filed with the Common Council of the City of Brookfield read essentially as follows:

I, Raymond J. Sambs, sustained injuries and damages on February 21, 1965, under conditions as set forth in the Notice of Injury served your City Clerk on or about June 14, 1965.

Such injuries include:

Fracture dislocation, closed T7 and T8 with transection of the spinal cord; spastic paraplegia; hemothorax secondary to above; injury to Deltoid and Latissima Dorsi muscles affecting his right arm; fracture of five or six ribs; multiple lacerations of the left hand and fingers; and, contusions and abrasions to his upper torso and other injuries to the body; that claimant suffered in addition

CONCLUSION

In view of the constitutional challenge presented to this court, secs. 81.15 and 895.43 (2), Stats., wherein the legislature has created arbitrary, capricious and unreasonable classifications in violation of state and federal constitutions, are hereby declared unconstitutional. All damages awarded to the plaintiff were proper, and the plaintiff is entitled to recover the full amount of the verdict as returned by the jury and approved by the trial court.

By the Court. — Judgment affirmed.

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great mental and physical pain, nervousness, shock and anguish....

Claim is hereby made against the City of Brookfield for satisfaction of such injuries and damages in the sum of One Million Five Hundred Thousand ($1,500,000) Dollars. Dated June 17, 1970 and signed by Raymond J. Sambs.

APPENDIX C

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

RAYMOND J. SAMBS, a Minor
by V. JOHN BURGGRAF,
his Guardian ad Litem,
Plaintiffs,

DECISION

vs.

WAYNE J. NOWAK and
ROYAL GLOBE INSURANCE COMPANIES
a foreign corporation,
Defendants. Case No. 21718

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RAYMOND J. SAMBS,
Plaintiff
Appellant,

vs.

CITY OF BROOKFIELD
a municipal corporation,
Defendant
Respondent. Case No. 27230

I. *Motions After Verdict*

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II. *The constitutionality of Sections 81.15 and 895.43 (2).*[2]

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[2]In *Schwartz v. Milwaukee* 43 Wis.2d 119, 168 N.W.2d 107 (1969), and 54 Wis.2d 286, 195 N.W.2d 480 (1971) court urged repeal of 81.15 since it has been supplanted by *Holytz v. Milwaukee* 17 Wis.2d 26, 115 N.W.2d 618 (1962). Reference in our discussion will henceforth be made to 895.43 (2).

Plaintiff challenges the constitutionality of Sections 81.15 and 895.43 (2) Wisconsin Statutes, in that both statutes limit tort liability of municipal governments, and as such are violative of both the United States and Wisconsin Constitutions.

Section 81.15 reads:

> "If damages happen to any person or property by reason of insufficiency or want of repairs of any highway ... the person sustaining such damages shall have the right to recover the same from such town, city or village ... the amount recoverable by any person for any damages so sustained shall in no case exceed $25,000.00".

Section 895.43 (2) provides as follows:

> "The amount recoverable by any person for any damages, injury, or death, in any event founded on tort against any ... governmental subdivision ... shall not exceed $25,000.00".

The contention is that both statutes violate the equal protection and due process clause of the 14th Amendment. It provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Wisconsin constitutional provision on "Equality" is Sec. 1, Article I. It reads:

> "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of

happiness; to secure these rights, governments are instituted among men, deriving their first powers from the consent of the governed."[3]

Standing to Make Challenge.

In order to challenge the statute on constitutional grounds of unequal protection, the one raising such issue must be a member of the class claimed to be disadvantaged by the statute. *Moedern v. McGinnis* 70 Wis.2d 1056, 236 N.W.2d 240 (1975). In this instance, the challenged statute divides a natural class of tort feasors into two allegedly, arbitrary classes; private tort feasors and governmental tort feasors. *Cords v. State* 62 Wis.2d 42, 214 N.W.2d 405 (1974).

In so doing, the statute creates a $25,000.00 limitation on the tort liability of a governmental tort feasor, while no such limitation exists for the private tort feasor. In application, however, the statute further creates two subclassifications splitting the natural class of victims of negligent conduct into victims of governmental negligence whose recovery is limited to $25,000.00, and victims of private negligence, who are subject to no such restriction.[4]

In the case at bar plaintiff was awarded damages in excess of the $25,000.00 limitation and if sec. 895.43 (2) is found applicable, he will be denied the full recovery of his damages. Therefore, plaintiff is a member of the class "claimed to be disadvantaged by the statute" and thus has requisite standing to challenge the statute.[5]

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[3]The equal protection clause of the Wisconsin Constitution has been held to be substantially identical to the 14th Amendment. *Sonneborn v. Sylvester* 26 Wis.2d 43, 132 N.W.2d 249 (1965). Therefore the two will be discussed as one.

[4]See ch. 655 Wis. Stats.

Presumption of Constitutionality

A strong presumption of constitutionality is attached to statutes enacted by the Legislature. One who challenges a statute on grounds of unconstitutionality must show such statute to be unconstitutional beyond a reasonable doubt. *State ex rel Strykowski v. Wilkie* 81 Wis.2d 491, —N.W.2d— (1978).

It is now the function of this court, however, to determine the constitutionality of a statute on the basis of the evidence as presented or on public policy grounds. To do so would be to invade the province of the Legislature which has great discretion in this regard. The classifications made by the Legislature need not be proper, but merely reasonable. *State ex rel Real Estate Examining Board v. Gerhardt* 39 Wis.2d 701, 159 N.W.2d 622 (1968).

As stated by the Supreme Court in *State v. Duffy* 54 Wis.2d 61, 195 N.W.2d 624 (1972); at p. 65:

> "Equal protection of the law is denied only where the Legislature has made irrational or arbitrary classifications ... The test is not whether some inequality results from the classification, ... but whether there exist any reasonable basis to justify the classification."

While the statutory classifications created in 895.43 (2) must be upheld if a reasonable basis for such legislation is conceivable, the presumption of constitutionality does not preclude examination by the courts. A statutory classification cannot be beyond challenge merely because the Legislature chose to

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[5]It could be argued that the attack on the constitutionality of the statute is premature since the statute speaks of "the amount recoverable ... shall not exceed $25,000." rather than judgment obtained. But such an approach would create only a delay in meeting the question head-on.

create such. While the Legislature has the authority, in creating particular rights of action, to distinguish between classes of persons, such classification must be based upon a proper *economic, political, or social basis. Christoph v. Chilton* 205 Wis. 418, 237 N.W. 134 (1931) *Harris v. Kelley* 70 Wis.2d 242, 234, N.W.2d 628 (1975).

> "If the classification does not rest upon a difference between the classes which bears a fair, substantial, natural, reasonable and just relation to the objective of the act, it is a violation of the guarantee set forth in the 14th Amendment of the United States Constitution that all citizens are entitled to equal protection of the laws." *Harris v. Kelley,* supra p. 251.

In essence, therefore, the court should look to the interests and circumstances involved in the application of a statutory classification. The United States Supreme Court endorsed such an approach in the case of *Kramer v. Union Free School District No. 15* 395 U.S. 621, 89 S.Ct. 1886, Lawyer's Ed.2d 583 (1969) where it stated:

> "In determining whether or not a state law violates the equal protection clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification."

The grounds for distinguishing between public and private tort feasors and their victims.

Defendant contends that reasonable grounds do exist for distinguishing between public and private tort feasors and their victims, in that victims of public tort feasors are compensated out of public funds. It is alleged that since municipalities are dependent on its taxpayers for funds, a judgment in excess of the

municipality's liability insurance coverage could result in the curtailing of necessary services, or increasing taxes.[6]

Principally the statute must exhibit a reasonable governmental purpose legitimizing its classifications.

The court in *Cahill v. Milwaukee* 41 Wis.2d 643, 165 N.W.2d 198 (1969) lists five rules regarding the propriety of legislative classification:

> "1. All classifications must be based upon substantial distinctions which make one class really different from another."
>
> "2. The classification adopted must be germane to the purpose of the law."
>
> "3. The classification must not be based on existing circumstances only."
>
> "4. To whatever class a law may apply, it must apply equally to each member of that class."
>
> "5. The characteristics of each class must be so different from those of other classes as to reasonably suggest the propriety, with due regard to the public good, of substantially different legislation for each class."

Fulfilling their requirements of legislative classification.

An in-depth examination of the classifications created by the statute would indicate a failure to fulfill

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[6]Sec. 895.46 in part states: "where ... defendant ... is a public officer or employee ... is proceeded against as ... employee and the jury ... finds defendant was acting within ... scope of employment ... the judgment as to damages ... in excess of any insurance applicable to such ... employee shall be paid by ... political subdivision of which ... defendant is an ... employee ..."

the requirements of the classifications, and in particulars rules 1, 4 and 5.

What substantial distinctions are there which differentiate the victims of public tort feasors from those similarly affected in the private sector? Can it be said that their injuries are any less severe and therefore merit less compensation in damages than those causally injured by private tort feasors? Is there any difference in the medical expenses, loss of present and future earnings, or other general or compensatory damages they may incur?

We are hard pressed for an answer unless we totally disregard the classifications of victim and rely only on classifications of tort feasor.[7]

Defendant's argument is that since the judgment, if it exceeds liability insurance coverage will be paid out of the public treasury, the classifications are valid. Is this then a substantial distinction between the classes? This court holds that the source of funds to compensate an injured victim can form little or no basis for distinguishing between those that form the natural class of negligence victims. To do so would be tantamount to determining a victim's damages on the basis of the identity of the tort feasor.

In that the classification is not based on any actual substantial distinctions between the classes it must be considered violative of equal protection.

Further analysis demonstrates that the staute does not apply equally to each public tort victim. It ignores the degree of injury to the victim and the amount of damages awarded. There is no equality when victim suffering damages to the maximum the statute allows

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[7]Even with respect to public tort feasor the Legislature has treated it differently and created some highly artificial distinctions. See secs. 345.05, 114.065, 895.45 (4), 895.46.

and another who sustains damage to a sum beyond that limitation and is compelled to recover only the alloted maximum, the statute discriminates between members of the same class. It is essentially a subclassification based on the degree of injury and as such, increases the hardship imposed on the victim as the severity of his injuries increase.

Thus the statute cannot be said to create "minor differences in tort recovery" as was stated by the Supreme Court in *Binder v. Madison* 72 Wis.2d 613 — N.W.2d— (1975), when the statute and other provisions relate to "procedures." Here we are confronted by "substance."

The statute fails in the rule of equality.

In the case at bar, plaintiff suffered total paralysis from the waist down. The degree of his injuries and the amount of damages found by the jury to compensate him for the severe disability suffered was assessed at $949,645.66. Yet the statutory limit of recovery to the plaintiff reaches to but a most insignificant fraction of the actual damages. The statutory amount would barely compensate plaintiff for past medical, hospital, drug and equipment expense and leave plaintiff without any recovery for his pain, suffering and disability and for future medical, hospital, housekeeping costs, loss of earnings and permanent disability. A statute which can produce such inequities lacks fairness and equality.

The contention is also advanced that the money limitation of the statute operates for the good of the public. Can it be said that the public is better served by a law which denies severely injured and disabled tort victims their rightful recovery? Is it then more desirable to leave such victims to public assistance programs funded by public tax dollars? While it may rightly be said that matters of public policy are for the

Legislature and not for the court to determine, *Omernik v. State* 64 Wis.2d 6, 218 N.W.2d 734 (1974), the difficulty here is in finding a rational policy to support the dollar limitation statute. While equal protection does not require that all persons be dealt with identically, *Duke v. Power Co. v. S. Carolina Tax Comm.* 81 Fed.2d 513 (1936), it does require that the distinction made have some relevance to the purpose for which the classification is made. *Herro v. Burk* 422 Fed.2d 1195 (1970).

The meaning of the equal protection of laws is to assure that every person within the state's jurisdiction will be protected against intentional and arbitrary discrimination, whether arising out of the terms of a statute, or the manner in which the statute is executed. *State ex rel Murphy v. Voss* 34 Wis.2d 501, 149 N.W.2d 595 (1967). If the concept of equal protection is to maintain any credibility it must protect against arbitrary and unreasonable classification by the Legislature. Extensive research on this topic has failed to produce any evidence showing the imminent backruptcy of municipalities not protected by a statute limiting liability. Other states have dealt with this situation without undue hardship.[8]

The statute is unreasonable in its application.

In the case of *Holytz v. Milwaukee* 17 Wis.2d 26, 115 N.W.2d 618 (1962) governmental immunity as to tort liability was removed. The court did not pass upon the constitutionality of the statutory limitation of 81.15, other than a passing reference. Sec. 895.43 (2) had not as yet been adopted.

What occurred however in the economy affecting each tort victim since *Holytz* and the enactment of

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[8]See 26 *University Florida Law Rev.* 89 (1973) *Insurance Program to Affectuate Waiver of Sovereign Tort Immunity.*

895.43 (2) in 1963 is of deep significance and mirrors the unreasonableness of the statute.

The rise in inflation marks its impact on the statute's dollar limitation. In *Cords v. Anderson* 80 Wis.2d 525, 259 N.W.2d 672 (1977) the Supreme Court said:

> "This court has previously taken into account the effect of inflation on the adequacy of damage verdicts. A verdict that ... 'would have been excessive years ago might not even be adequate to-day.' *Crye v. Mueller* 7 Wis.2d 182, 191 96 N.W.2d 520 (1958). Juries have been allowed to consider changing economic conditions between the time of injury and the time of trial and jury instructions to that effect have been approved. Bethke v. Duwe 256 Wis. 378, 41 N.W.2d 277 (1949); *Dabareiner v. Weisflog* 253 Wis. 23, 33 N.W.2d 220 (1948)."

It is thus proper to discuss the dollar value and the dollar limitation which controls the statute under consideration. Factually the $25,000. limitation is not what it purports to be. The United States Bureau of Labor Statistics of which this court takes judicial notice, reports that since 1963, the Consumer Price Index has risen to 104.3 percent. By this standard the value of the $25,000. limitation imposed by the Legislature is fictional for it is no longer that, but instead $12,238.00, less than half of what the Legislature had in mind when it decreed the $25,000. limitation.

The arbitrariness of the $25,000. limitation is clearly brought into focus by an examination of salaries paid to major representatives of the three

branches of government; the figures were supplied by the Wisconsin Legislative Fiscal Bureau.[9]

While attention to these figures does not in any way infer any unjustified increase in governmental salaries, it emphasizes the inflationary spiral and the attempt of responsible government to meet it in one sector and disregard it in another, i.e. the victim of public negligence. Thus the very purpose of the statutory limitation is lost in the reality of life. Unfortunately no change in the limitation has legislatively taken place in the last 15 years.

An interesting correlation can be made between the statutes considered at bar and, the history of sec. 895.04, Wisconsin's Wrongful Death Act. In 1935 there was fixed a statutory limit of recovery to $12,500. compensatory damages. In 1951, 1959 and 1967 the limitation was raised to $15,000., $22,500 and $35,000 respectively for wrongful death. Finally a more prudent sense of justice prevailed and in 1971 the limitation in compensatory damages was entirely eliminated. The ever-changing history of 895.04 can be viewed as an example of the frustration of adopting dollar limitation provisions.

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	1963	1977	Percent Increase 1963-1977
Governor	$25,000.	$49,920.	97.7%
Supreme Court Justices (Chief Justice salaries slightly higher)	$24,000.	$44,160	84%
Circuit Judge (This includes county supplements which vary in amounts from one county to top amount indicated above)	$17,999.92	$40,921.56	127.34%
Legislator	$3,600.	$17,843.	495%

The statute deprives a victim of governmental negligence of a trial by jury.

Both the State and Federal Constitutions insure a litigant in a civil action the right to a trial by jury.[10]

Such a right cannot be lightly or casually restricted. It has consistently been reaffirmed against unwarranted restrictions. In *State ex rel Schumacher v. Markham* 160 Wis. 431, —N.W.— (1915) the Wisconsin Supreme Court said:

> "The Legislature cannot, by attempting to change the manner of procedure, convert a legal action into an equitable one so as to defeat the right of trial by jury."

The only way in which the plantiff's right of a jury trial as to the amount of damages can be constitutionally denied him "is to deny him such trial in circumstances such that he is not injured, and therefore not prejudiced by such denial." *Jolitz v. Fintch* 229 Wis. 256 at 259, 282 N.W. 87 (1938).

In *LaBowe v. Balthazor* 180 Wis. 419, —N.W.— (1923) the court struck down a statute ch. 244, Laws 1921 which required that a party demanding a trial by jury must advance $2.00 for each juror on the panel.

Said the court:

> "The public policy of the state, however, is determined by the constitution so far as jury trials are concerned, and the legislature is not permitted to circumvent the constitutional provision in order to even secure a better public policy. That can only be done by a Constitutional Amendment."

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[10]Art. I, sec. 5, Wis. Const.: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy..."

In the instant proceeding plaintiff presented his case to a jury of his peers. His damages were assessed by the jury. This court has already said that the award of the jury is fair and reasonable and in accord with all the credible evidence in the case.

The statutes under consideration would effectively remove the right of a seriously injured person to recover damages assessed by a jury which are found to be supported by the evidence.

Were sections 81.15 and 895.43 (2) upheld, it would indeed be a hallow proceeding to parade witnesses before a jury who would testify to permanent, serious disability of the injured claimant, since a damage award in excess of the dollar limitation in the statute would be futile.

While it may be said that the Legislature has power to reinstate governmental immunity, *Sambs v. Brookfield,*[11] it cannot compel a victim of a causally negligent municipality to give up against his will the right to recover for all damages he has suffered.

As was said in *Frost v. Railroad Commission of California* 271 U.S. 583, 593, 70 Lawyer's Ed. 1104 (1926):

> "... It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of

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[11]66 Wis.2d 296, "The doctrine of sovereign immunity as it relates to municipalities and ones of judicial origin has now been placed in the hands of the Legislature ..."

> constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The powers of a trial judge are quite limited when it comes to matters reserved to jury determination. The court may not reduce or raise damages fixed by a jury and direct an absolute judgment for such court determined amount in that the recovering parties' right to a jury trial would be abridged. *Borowicz v. Hamann* 193 Wis. 324 (1927).

> "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages." *Jennings v. Safeguard Ins. Co.* 13 Wis.2d 427, 109 N.W.2d 90 (1961).

A court may not discard the verdict of a jury as to damages and insert what it believes to be a better reasoned amount. However, the Legislature has seen fit to do exactly that by enactment of limitation provisions in Sec. 81.15 and 895.43 (2). While the Legislature presumably acted on some type of public policy ground in passing such legislation, the nature of right to trial by jury cannot be subject to the whims of policy considerations.

Imbedded in the law is the proposition that the verdict of a jury is sacrosanct and is not to be disturbed unless there be no credible evidence to

support it, or the jury's findings exhibit perversity or prejudice, or where it fails to follow the court's instructions on the law, or where the damages found are grossly excessive or grossly inadequate, or otherwise shock the conscience of the court. And in the latter situations a remedy is usually afforded by granting a new jury trial.

Nowhere has it ever been said that a jury verdict with respect to damages it found, can be vetoed by legislative fiat, for to do so is but a patent move to deprive the injured of his right to trial by jury.

There must be a line beyond which legislative action becomes legislative control and an unwarranted intrusion into the judicial system. See *United States v. Howard* 440 Fed. Supp. 1106 (1977).

The challenged statutes are such an unwarranted intrusion, depriving a litigant of his right to trial by jury unfettered with the dollar limitation of a statute. Such statutes indeed are an intrusion as well upon the doctrine of separation of powers, between the legislative and judicial.

The law in other jurisdictions

There is a paucity of case law on the subject of dollar limitation for a victim of a municipal tort feasor. The Nevada Supreme Court in *State v. Silva* 86 Nev. 911, 478 Pac2d 591 (1970), the court disposed of the constitutionality of the state's statutory $25,000 limit by saying:

> "In the nature of things equality of treatment as to the amount of damages cannot be achieved, and in our view, the equal protection clause has no bearing upon the subject. Cf. *Dandridge v. Williams* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 49 (1970). It was within the legislative power to limit recovery."

The Nevada decision is in no wise an analysis of the law involved. *Dandridge* supra has of course nothing to do with a dollar limitation invoked by statute upon an injured victim of a public tort feasor.

The case had to do with grants of welfare payments to families receiving Federal Aid to Families with Dependent Children (AFDC) and the right of the state of Maryland to set a maximum amount. While the U.S. Supreme Court approved the Maryland statute, it said:

> "Although a State may adopt a maximum grant system in allocating its funds available for AFDC payments without violating the Act, it may not, of course impose a regime of insidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment ..."

Of a case directly in point with the case at bar is *Treece v. Shawanee Community Unit School Dist. No. 84* 39 Ill.2d 136, 233 N.E.2d 549 (1968).

There the court said:

> "We deem that the challenge by the defendant Bridewell to the constitutionality of section 825 subd. A of the School Code (Ill. Rev. Stats. 1965, Chap. 122, par. 825, Subd. A), which limits the recovery in each separate cause of action against a public school district to $10,000 is well founded. While this court has not specifically ruled on the validity of the restricting statute in question, our attitude toward arbitrarily formulated and restricting statutes of this type has been made clear by our expression in (other cited decisions)".

Conclusion

Applying the factual situation in the case before us, both secs. 81.15 and 895.43 (2) Wis. Stats., wherein the Legislature attempts to limit the dollar recovery of an injured victim from a municipal tort feasor is arbitrary, and discriminatory, exceeds the bounds of reason and is therefore in violation of the constitutional guarantees of equal protection and the right to a trial by jury.

The subject statutes are a low key attempt to disinter the royal rule of law that "the King can do no wrong" safely buried by *Holytz v. Milwaukee* supra.

In ruling as we do today, we follow the admonition of President Abraham Lincoln who over a century ago said:

> "It is an much the duty of government to render prompt justice against itself in favor of its citizens, as it is to administer the same between private individuals." Quoted in *Kennecott Copper Corp. v. State Tax Comm.* 327 U.S. 573, at 580, 66 S.Ct. 745, 90 Lawyer's Ed. 862 (1946).

The statutes are invalid and plantiff is entitled to recover the full amount of the verdict as returned by the jury.

DATED this *9th* day of *May,* 1978.

BY THE COURT:

/s/ Max Raskin
MAX RASKIN
Circuit Judge

APPENDIX D

UNPUBLISHED DECISION OF WISCONSIN SUPREME COURT IN CASE #75-532, SAMBS v. CITY OF BROOKFIELD, DATED February 23, 1976

The motion of defendant-respondent to dismiss the appeal in this case having been considered by the Court, and the Court having determined that the amended interlocutory judgment was entered of record on March 19, 1975, although signed by the trial judge on March 18, 1975, and that formal notice of entry of the judgment was not given in this case, the mailing of a copy being insufficient, *Stolper Steel Products Corp. v. Behrens Mfg. Co.* (1959) 8 Wis.2d 299, 99 N.W.2d 111; *Hooker v. Hooker* (1959) 8 Wis.2d 331, 99 N.W.2d 113, and the Court having determined that its prior opinion in this case is not res judicata on the question of the constitutionality of municipal limits of liability under secs. 81.15 and 895.43, Stats., and the amended interlocutory judgment entered on remand is not in accordance with the mandate of this Court to the extent that it purports to limit the liability of the defendant to the sum of $25,000 plus statutory costs and disbursements,

IT IS ORDERED that the judgment is amended to delete the language stating that the liability of the defendant is limited to the sum of $25,000 plus statutory costs and disbursements. As modified, the judgment is affirmed without opinion under sec. (Rule) 251.93, Stats. No costs taxed.

(Formal Parts Omitted)

APPENDIX E

81.15 Damages caused by highway defects; liability of town and county. If damages happen to any person or his property by reason of the insufficiency or want of repairs of any highway which any town, city or village is bound to keep in repair, the person sustaining such damages shall have a right to recover the same from such town, city or village. If such damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county shall be liable therefor and the claim for damages shall be against the county. If the damages happen by reason of the the insufficiency or want of repairs of a bridge erected or maintained at the expense of 2 or more towns the action shall be brought against all the towns liable for the repairs of the bridge and upon recovery of judgment the damages and costs shall be paid by such towns in the proportion in which they are liable for such repairs; and the court may direct the judgment to be collected from each town for its proportion only. No such action shall be maintained unless within 120 days after the happening of the event causing such damages, notice in writing signed by the party, his agent or attorney shall be given to the county clerk of the county, a supervisor of the town, one of the trustees of the village or mayor or city clerk of the city against which damages are claimed, stating the place where such damages occurred, and describing generally the insufficiency or want of repair which occasioned it and that satisfaction therefor is claimed of such county, town, city or village. No notice given hereunder shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place or the insufficiency or want of repairs which caused the damages for

which satisfaction is claimed, if it appears that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby. The amount recoverable by any person for any damages so sustained shall in no case exceed $25,000. No action shall be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless such accumulation existed for 3 weeks.

History: 1963 c. 435.

CIVIL LIABILITY

345.05 State and municipal liability for motor vehicle accidents. (1) In this section the following terms have the designated meanings:

(a) "Municipality" means any county, city, village, town, school district (as enumerated in s. 67.01 (1)), sewer district, drainage district, community center and, without restriction because of failure of enumeration, any other political subdivision of the state.

(b) "Governing body" means the state legislature with reference to the state, the county board with reference to counties, the town board with reference to towns, the legislative body of a city or village with reference to cities and villages and the board of any district, center or other municipality with reference to other municipalities enumerated in par. (a).

(c) "Business" means any business whether governmental or proprietary.

(2) Any of the following may file a claim for damages against the state or municipality concerned and the governing body thereof may allow, compromise, settle and pay the same:

(a) A person suffering any damage proximately resulting from the negligent operation of a motor

vehicle owned and operated by the state or a municipality, which damage was occasioned by the operation of such motor vehicle in the course of its business. For the purposes of this subsection, a motor vehicle shall be deemed owned and operated by the state or a municipality if such vehicle is either being rented or leased, or is being purchased under a contract whereby the state or municipality will acquire title.

(b) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned or operated by the state through the agency of the Wisconsin national guard, the Wisconsin air national guard or the members or employes thereof when on state duty and whether paid from state or federal funds and which damage was occasioned by the operation of such motor vehicle in the performance of its business.

(3) The manner and form of and the place for filing claims shall be:

(a) If against the state, as provided in s. 16.53 (8), with the department of administration.

(b) If against any county, as provided in ss. 59.76 and 59.77 (1), with the county clerk.

(c) If against any city, as provided in s. 62.25, with the city clerk.

(d) If against any village, as provided in s. 61.51, with the village clerk.

(e) If against any town, as provided in s. 60.36, with the town clerk.

(f) If against any school district, as provided in s. 40.31.

(g) If against any other municipality, the claim shall be filed with the person who performs the duties of a clerk or secretary and shall state the time and place of the accident and an itemized statement of the damages sought.

(4) Failure of the governing body to pass upon the claim within 90 days after presentation constitutes a disallowance. Disallowance by the governing body bars any action founded on the claim unless brought within 6 months after disallowance. Actions against the state and payment of the amount recovered shall be as provided in ss. 285.01 and 285.04. For the purposes of this section, judgments against municipalities shall be certified, filed and collected as provided in s. 66.09 whether named therein or not.

(5) If the allowance of claim is by or the judgment is against any municipality lying in more than one town, city, village or county, the governing body of the debtor municipality shall prorate the amount of the claim allowed or the judgment and so certify to the proper officials for tax levy, so that the taxable property of the debtor municipality will equitably bear the amount of the claim or judgment.

(6) This section does not create any liability against a county for any act of the sheriff where such liability is prohibited by Article VI, section 4, Wisconsin constitution.

History: 1961 c. 550.

270.58 State and political subdivisions thereof to pay judgments taken against officers. (1) Where the defendant in any action, writ or special proceeding is a public officer and is proceeded against in his official capacity and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer shall be paid by the state or political subdivision of which he is an officer. Reasonable attorney's fees shall also be paid by the political subdivision in false arrest cases where such governmental unit does not provide legal counsel to the defendant officer. Deputy sheriffs in

those counties where they serve not at the will of the sheriff but on civil service basis shall be covered by this subsection, except that the provision relating to payment of the judgment shall be discretionary and not mandatory. In such counties the judgment as to damages and costs may be paid by the county if approved by the county board.

(2) Any town officer held personally liable for reimbursement of any public funds paid out in good faith pursuant to the directions of electors at any annual or special town meeting shall be reimbursed by the town for the amount of the judgment for damages and costs entered against him.

History: 1961 c. 499.

895.43 Tort actions against political corporations, governmental subdivisions or agencies and officers, agents or employes; notice of claim; limitation of damages and suits. (1) No action founded on tort, except as provided in s. 345.05, shall be maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of such corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment unless within 120 days after the happening of the event causing the injury or damage or death complained of, written notice of the time, place and circumstances of the injury or damage signed by the party, his agent or attorney is served on such volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 262.06. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the damage or injury and

the injured party shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe.

(2) The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employes for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $25,000. No punitive damages shall be allowed or recoverable in any such action.

(3) No suit shall be brought against any political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor shall any suit be brought against such fire company, corporation, subdivision or agency or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

(4) Except as hereinafter provided, the provisions and limitations of this section shall be exclusive and shall apply to all actions in tort against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employe thereof for acts done in an official capacity or the course of his agency or employment. Nothing in this section shall bar an action or impose limitations in any action against any such officer, official, agent or employe individually for intentional torts. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or

agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (2) shall be inapplicable.

History: 1963 c. 198; 1965 c. 66 s. 2.

66.091 Mob damage. (1) The county shall be liable for injury to person or property by a mob or riot therein, except that within cities the city shall be liable.

(2) Claim therefor must be filed within 6 months thereafter. Such claim may be allowed in whole or in part, as other claims, and procedure to enforce shall be as for other claims.

(3) The city or county may recover all such claims and costs paid by it, against any and all persons engaged in inflicting the injury.

(4) No person shall recover hereunder when the injury was occasioned or in any manner aided, sanctioned, or permitted by him or caused by his negligence, nor unless he shall have used all reasonable diligence to prevent the same, and shall have immediately notified the mayor or sheriff after being apprised of any threat of or attempt at such injury. Every mayor or sheriff receiving such notice shall take all legal means to prevent injury, and if he refuse or neglect to do so, the party injured may elect to hold such officer liable by bringing action against him within 6 months of the injury.

(5) This section shall not apply to property damage to houses of ill fame when the owner has notice that they are used as such.

History: L. 1863 c. 211 §§1, 3, 5, 6, 7.

174.11 Claims for damage by dogs to domestic animals; payable, when, from dog license fund; appeals. (1) The owner of any domestic animals (including poultry) attacked, chased, worried, injured or killed by a dog or dogs may within 3 days after the owner has knowledge or notice thereof, file a written claim for damages with the clerk of the town, village or city in which the damage occurred or, if it occurred in a town or village, with the chairman of such town or the supervisor of such village. The form of such claim may be prescribed by the state department of agriculture. Upon presentation of such claim the supervisors of the town, the board of trustees of the village, or the common council of the city, or a committee appointed for that purpose by the supervisors, the board of trustees or the common council shall promptly investigate said claim and may subpoena witnesses, administer oaths and take testimony relative thereto and shall within 30 days after the filing of said claim make, certify and return to the county clerk said claim, a report of the investigation, the testimony taken and the amount of damages suffered by the owner of said animals, together with the assessed valuation of same as shown on the last assessor's blotter or record for personal property assessements or if there be none, then the assessed value of similar animals on such blotter or record.

(2) The form of the report and certification may be prescribed by the state department of agriculture, and shall be subscribed by the supervisors, board or committee making the same. The county clerk shall lay before the county board at its first meeting, following the receipt of any such claim, all claims so filed and reported and the same shall be acted upon and determined by the county board as other claims are determined and acted upon, and the county board shall equalize the values and claims between and

within the various towns of the county. The amount of damages filed and reported to the county clerk shall be prima facie proof of the actual damages sustained, but evidence may be taken before the county board relative to the claims as in other cases and appeals from the action of the county board shall lie as in other cases. On appeal from the action of the county board, said trial shall be by the court without a jury.

(3) Such claims shall be solely against the dog license fund and shall create no other liability on the part of the county. When said claims shall be finally determined, the claimant shall be paid 90 per cent thereof out of the dog license fund.

(4) The amount allowed by the county board upon any such claim shall in no case exceed 50 per cent more than the assessed valuation of such personal property as shown on the last assessor's blotter or other record for personal property assessments. When any assessable personal property for which claim is made does not appear on such assessor's blotter or record it shall be deemed to be of the same value as the assessed valuation of similiar personal property upon such blotter or record in the town, city or village in which the claim arose. Provided, that whenever the claimant shall furnish conclusive evidence as to the ownership of the dog or dogs doing the damage the claimant shall be paid the full market value of the damaged property; and for each horse or mule for which such claim is made the county board shall allow not to exceed $100. No claim shall be paid to any person who has failed or neglected to pay a dog tax on an assessable dog.

History: L. 1919, c. 527.

APPENDIX F

Madison, August 11, 1980

To: V. John Burggraf, Wauwatosa
Harold H. Fuhrman, Milwaukee
Aaron Belongia, Milwaukee
Michael J. Gross, Waukesha
George A. Schmus, West Allis
Burt Natkins, Madison
W. Ted Thornehl, Milwaukee

The Court today announced an order in your case as follows:

RAYMOND J. SAMBS v. CITY OF BROOKFIELD, #78-599.

MOTION FOR RECONSIDERATION DENIED WITH COSTS.

Justices Abrahamson and Steinmetz took no part.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX G

Raymond J. Sambs,
Plaintiff-Respondent,

v.

City of Brookfield,
Defendant-Appellant-Petitioner.

REMITTITUR

Appeal No. 78-599

This cause was a review the Decision of the Court of Appeals, District II. On consideration whereof, it is now here ordered and adjudged by this Court in an opinion filed on June 27, 1980, that the Decision of the Court of Appeals, District II in this cause is reversed; the judgment of the circuit court is reversed; and the cause is remanded to the circuit court for further proceedings consistent with this opinion, with costs against said appellant/respondent taxed in the sum of

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The appeal record is hereby returned to the Clerk of Courts for Waukesha County.

Motion for reconsideration denied with costs. Justices Abrahamson & Steinmetz took no part.

I certify that the above is a correct transcript of the original order and judgment of the court in the above entitled cause.

Dated this 13th day of August, 1980.

/s/ Marilyn L. Graves
Clerk of the Supreme
Court of the State of Wisconsin

No. 80-572

NOV 10

MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. SAMBS,

Petitioner,

vs.

CITY OF BROOKFIELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Was the Wisconsin Supreme Court correct in holding that Wisconsin's statutory scheme limiting the amount of recovery against governmental tortfeasors is valid under the State and Federal Constitutions?

TABLE OF CONTENTS

	PAGE
Question Presented For Review	i
Table Of Authorities Cited	iv
Statement Of The Case	2
Reasons For Denying Writ	3
I. The Imposition of Limitations of Liability on Certain Governmental Activities Does Not Violate Constitutional Guarantees of Equal Protection	3
II. There is no Conflict of Decision	6
III. The Judgment Below Rests Upon an Adequate State Ground	8
IV. The Seventh Amendment Claim Was Not Raised Below	10
Conclusion	11

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TABLE OF AUTHORITIES CITED

Cases

PAGE

Bothwell v. Buckbee-Mears, 275 U.S. 274 (1927) 10

Fuller v. Oregon, 417 U.S. 40 (1974) 5

Griswold v. Connecticut, 381 U.S. 479 (1965) 5

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 8, 10

Labine v. Vincent, 401 U.S. 532 (1971) 5

Lynch v. New York, 293 U.S. 52 (1934) 8, 10

McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) 4

McGowan v. Maryland, 366 U.S. 420 (1961) 4

Monks v. New Jersey, 398 U.S. 71 (1970) 10

San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973) 3

Turner v. Staggs, 510 P. 2d 879 (Nev.) cert. denied sub. nom. Clark County v. Turner, 414 U.S. 1079 (1973) 6, 7, 8

Binder v. City of Madison, 72 Wis. 2d 613, 241 N.W. 2d 613 (1976) 7

Estate of Cargill v. City of Rochester, ... N.H. ....., 406 A. 2d 704 (1979) 7

Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962) 8, 9

Sambs v. City of Brookfield, 97 Wis. 2d 356, 292 N.W. 2d 504 (1980) 7, 8, 9

Stanhope v. Brown County, 90 Wis. 2d 823, 280 N.W. 2d 711 (1979) 8

Statutes

PAGE

Wisconstin Statutes §81.15 3

Constitutional Provisions

Wisconsin Constitution art. IV, §27 ..... 7, 9

Wisconsin Constitution art. I, §1 9

Wisconsin Constitution art. I, §9 9

U.S. Constitution Amendment XIV 5, 8

U.S. Constitution Amendment VII 10

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-572

RAYMOND J. SAMBS,

Petitioner,

vs.

CITY OF BROOKFIELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, City of Brookfield, respectfully requests that this Court deny the petition for writ of Certiorari, seeking review of the opinion of the Wisconsin Supreme Court in this case. That opinion is reported at 97 Wis. 2d 356, 293 N.W. 2d 504.

STATEMENT OF THE CASE

Respondent agrees with the Petitioner's Statement, but would add the following in order to complete the Statement.

The Wisconsin Court of Appeals held that the ceilings on recovery imposed by the state statutes created improper classifications in violation of the equal protection guarantees of the state and federal constitutions.

The Wisconsin Supreme Court reversed that decision and concluded that the state statutes did not violate the constitutional guarantees of equal protection.

REASONS FOR DENYING WRIT

I. The Imposition of Limitations of Liability on Certain Governmental Activities Does Not Violate Constitutional Guarantees of Equal Protection.

The Wisconsin Supreme Court correctly employed the "rational basis test" in its equal protection analysis of Section 81.15, Wisconsin Statutes. The legislative classifications created by the monetary limitation of liability in that provision do not affect the requisite interests that trigger strict scrutiny analysis. Generally, the strict scrutiny analysis has been applied only where legislative classifications infringe on certain suspect classes or fundamental interests.

Classifications are considered "suspect" when the class is "saddled with such disabilities, or subjected to a history of purposeful unequal treatment, or relegated to such position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist.* v. *Rodriquez,* 411 U.S. 1, 28 (1973) The United States Supreme Court has held that suspect classifications are those that discriminate against classes of persons on the basis of race, alienage or national origin. The United States Supreme Court has limited the category of fundamental rights to those "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34. Fundamental rights include: Interstate Travel, Privacy, Voting in State Elections, Marriage and Procreation and First Amendment Rights.

Section 81.15, Wisconsin Statutes, is characterized as a limitation on the victim's right to recover in tort for in-

juries inflicted upon him. Since this right does not equate with, or appear to fall within those fundamental rights explicitly or implicitly recognized and guaranteed by the Constitution, the strict scrutiny analysis is not appropriate.

The Wisconsin Supreme Court correctly applied the "rational basis test." Under that analysis, rationality requires merely that distinctions drawn by a challenged statute bear some rational relationship to some conceivable state purpose. *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969) Use of this standard is characterized by extreme deference to the legislative branch and raises a presumption in favor of the constitutionality of the legislation under review. *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

The challenged statutes are an effort by the legislature to deal with governmental liability. Petitioner seems to suggest that all facets of governmental liability must be treated equally. This position ignores: (a) various risk factors associated with different governmental activities; (b) the disparate ability of the governmental units to respond in damages in tort actions; and, (c) the vast scope of activities and services which create potential liability and in which governmental bodies are involved.

The Wisconsin Supreme Court properly confronted these issues vis-a-vis the need to compensate citizens for damages. The Court concluded:

> "It is the legislature's function to structure statutory provisions, which protect the public interest in reimbursing the victim and in maintaining government services and which will be fair and reasonable to the victim and at the same time will be realistic regarding the financial burden to be placed on the taxpayers." 97 Wis. 2d at 377

Petitioner would have this Court devise a system to compensate victims of governmental torts. Clearly, when dealing with this type of social and economic situation, the judiciary is simply not the forum for change. The issues and problems associated with setting a limitation on governmental liability present a myriad of fiscal, economic, social and even philosophical problems particularly suited for the legislature. The comprehensive and detailed scheme needed to cover this situation will not be forthcoming from this single case or a line of cases.

Petitioner simply seeks to have this Court substitute its judgment for that of the Wisconsin legislature. Perhaps the Court could devise a better system, but that is not the Court's function.

> "The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. . ." *Labine* v. *Vincent,* 401 U.S. 532, (1971)
>
> "We do not inquire whether this statute is wise or desireable . . . misguided laws may nonetheless be constitutional . . . our task is merely to determine whether there is some rationality in the nature of the class singled out.
>
> . . . This legislative decision reflects no more than effort to achieve elemental fairness and is a far cry from the kind of individuous discrimination that the Equal Protection Clause condemns." *Fuller* v. *Oregon,* 417 U.S. 40, 50 (1974)

Petitioner seeks to utilize the Equal Protection Clause of the Fourteenth Amendment to revive "Substantive Due Process" which was time and again rejected by this Court.

> "We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold* v. *Connecticut,* 381 U.S. 479 (1965)

It seems clear that the purpose of the Equal Protection Clause is to afford federal protection to persons who have been victimized by misuse of governmental power—not to create a constitutional case from every tort in which a governmental body happens to be involved.

II. There is no Conflict of Decision.

As a last resort, Petitioner contends in his "Conclusion" that the decision of the Wisconsin Supreme Court conflicts with the decision of the Nevada Supreme Court in *Turner* v. *Staggs,* 510 P. 2d 879 (Nev.) *cert. denied sub. nom. Clark County* v. *Turner,* 414 U.S. 1079 (1973). Petitioner offers no further comment on the nature of this conflict since the issues before those courts were very different.

The Wisconsin Supreme Court was confronted with a challenge to the constitutionality of a state statutory scheme which establishes different limitations of governmental liability depending upon the function of government associated with the claimant's injury. The Wisconsin Court held that the statutory scheme does not violate the constitutional guarantees of equal protection. Petitioner now seeks to have this Court reexamine the validity of the state statutes.

In *Turner* v. *Staggs, supra,* the Supreme Court of Nevada was confronted with a constitutional challenge to the propriety of state statutes requiring that govermental units be presented with a notice of a claim within six months after the cause of action arose. The Nevada Court held that the statutory notice requirements created arbitrary classifications between private tortfeasors and governmental tortfeasors and that the subject statutes were

contrary to provisions of the state and federal constitutions. It should be noted that only one other state court has been confronted with the identical issues as those which confronted the Wisconsin Supreme Court in the case below. In *Estate of Cargill* v. *City of Rochester*, ... N.H. ....., 406 A. 2d 704, 708 (1979) the New Hampshire Supreme Court held that New Hampshire state statutes did not violate equal protection guarantees even though the state's statutory scheme imposed different ceilings of recovery for different torts and different governmental units. The issue, having arisen only twice in state courts, was resolved identically by both courts. *See Sambs* v. *City of Brookfield*, 97 Wis. 2d 356, 378 n. 13, 292 N.W. 2d 604, 515 n. 13 (1980).

In 1976, the Wisconsin Supreme Court did address an issue similar to that which confronted the Nevada Court in *Turner* v. *Staggs*. However, in *Binder* v. *City of Madison*, 72 Wis. 2d 613, 241 N.W. 2d 613 (1976), the Wisconsin Supreme Court held that the state statutes were constitutional and distinguished the *Turner* v. *Staggs* decision. The *Binder* court noted that Nevada's abrogation of sovereign immunity was complete, while in Wisconsin the right to condition sovereign immunity is specifically reserved by the state constitution. *Id.* at 624, 241 N.W. 2d at 619. The *Binder* Court specifically referred to Wisconsin Constitution art. IV, §27 which states: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

The two state decisions which Petitioner claims are in conflict are clearly distinguishable. In addition, the Wisconsin Court has expressly distinguished the Nevada decision on the basis of a provision of the Wisconsin Constitution.

III. The Judgment Below Rests Upon an Adequate State Ground.

The judgment below rests upon an independent and adequate state ground which deprives this Court of jurisdiction to review the state judgment. *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487 (1965). As discussed in the section above, petitioners base their request for review on a conflict with *Turner* v. *Staggs,* 510 P. 2d 879 (Nev.) *cert. denied sub. nom. Clark County* v. *Turner,* 414 U.S. 1079 (1973). The petition for writ of certiorari to the Supreme Court of Nevada was denied in *Turner,* "it appearing that the judgment below rests upon an adequate state ground." 414 U.S. at 1079.

In *Turner* v. *Staggs, supra,* the Nevada Supreme Court held that the state statutes violated the equal protection guarantees of the United States Constitution and violated several provisions of the Nevada Constitution. *Id.* at 882-83, 882 n. 7. Thus, this Court was deprived of jurisdiction pursuant to the rationale of *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487 (1965). *See also Lynch* v. *New York,* 293 U.S. 52, 54-55 (1934).

The Wisconsin Supreme Court in this case based its decision in part upon the Wisconsin Constitution and in part upon the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. *See Sambs* v. *City of Brookfield,* 97 Wis. 2d at 359-361, 361 n. 5, 293 N.W. 2d at 506-507 n. 5. Additionally, the Court relied heavily upon two earlier state decisions which were both based on the Wisconsin Constitution. *Stanhope* v. *Brown County,* 90 Wis. 2d 823, 280 N.W. 2d 711 (1979); *Holytz* v. *City of Milwaukee,* 17 Wis. 2d 26, 115 N.W. 2d 618 (1962).

The court below stated that the *Stanhope* decision was "relevant" and concluded, "for the reasons set forth in *Stanhope,* that a statutory limitation on recoverable dam-

ages . . . does not per se violate the guarantee of equal protection." *Sambs* v. *City of Brookfield,* 97 Wis. 2d at 368, 293 N.W. 2d at 510. In *Stanhope,* the Wisconsin Supreme Court held that state statutes which limit the recovery of the "victims of governmental tortfeasors" did not violate state[1] or federal constitutional guarantees and did not violate the "certain remedy clause," art. I, §9, of the Wisconsin Constitution.[2]

In *Holytz* v. *City of Milwaukee,* 17 Wis. 2d 26, 115 N.W. 2d 618 (1962), the other court decision relied on by the court below, the Wisconsin Supreme Court abrogated the doctrine of governmental immunity from tort liability in Wisconsin, but stated that the right to sue was subject to art. IV, §27 of the Wisconsin Constitution.[3] *Id.* at 41, 115 N.W. 2d at 618.

The Court below stated:

> "[W]e recognized in *Holytz* that limitations on public tort responsibility continue to exist. *Sambs* v. *City of Brookfield,* 97 Wis. 2d 356, 372, 293 N.W. 2d 504, 512 (1980).

---

[1] Wis. Const. art. I, §1, provides:
"All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

[2] Wis. Const. art. I, §9, provides:
"Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

[3] Wis. Const. art. IV, §27, provides:
"The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

The *Holytz* court, of course, recognized that such limitations would continue to exist because they were specifically provided for in the Wisconsin Constitution.

The controlling rule on which this Court must base its decision is:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that judgment as rendered could not have been given without deciding it . . . Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of the two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch* v. *New York,* 293 U.S. 52, 54-55 (1934) (citations omitted).

See also Jankovich v. *Indiana Toll Road Commission,* 379 U.S. 487 (1965).

Clearly, the decision below did rest on two grounds, one involving the U.S. Constitution and the other involving the Wisconsin Constitution and purely state law. As such, review by this Court of the validity of the state statutes would be improper.

IV. The Seventh Amendment Claim Was Not Raised Below.

Petitioner asserts that the Seventh Amendment is "pertinent" and "involved in this claim." (Petition, p. 3). The right-to-jury claim was not raised in or considered by the Wisconsin Supreme Court. Claims not asserted in the state court will not be considered on certiorari to this Court. *Monks* v. *New Jersey,* 398 U.S. 71 (1970); *Bothwell* v. *Buckbee-Mears,* 275 U.S. 274 (1927).

CONCLUSION

Petitioner seeks to have this Court reexamine the validity of a Wisconsin statute found to be constitutional by the Wisconsin Supreme Court. The only decision cited by the Petitioner as being in conflict with the decision below is a Nevada case which dealt with different statutes, different issues and different circumstances. Finally, the Wisconsin Supreme Court had independent and adequate state grounds for its decision.

For these reasons, the petition for a writ of certiorari should be denied.

Repsectfully submitted,

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